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No. 12688

United States
Court of Appeals
for the Ninth Circuit.

J. HOWARD McGRATH, Attorney General of the
United States, and D. W. BREWSTER, Dis-
trict Director, Immigration and Naturalization
Service for the District and Territory of
Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Territory of Hawaii.

FILED

DEC - 9 1950

United States
Court of Appeals
for the Ninth Circuit.

J. HOWARD McGRATH, Attorney General of the
United States, and D. W. BREWSTER, Dis-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Complainant, Chung Young:

E. J. BOTTS, ESQ.,
Stangenwald Building,
Honolulu, Hawaii.

For the Defendants, J. HOWARD McGRATH and
D. W. BREWSTER:

RAY J. O'BRIEN.
United States Attorney,
District of Hawaii,
Federal Building,
Honolulu, Hawaii.

In the United States District Court for the
Territory of Hawaii

Civil No. 963

Proceedings Under Nationality Act of 1940
Title 8, Section 903

CHUNG YOUNG,

Complainant,

vs.

J. HOWARD McGRATH, Attorney General of the
United States, and D. W. BREWSTER, Dis-
trict Director, Immigration and Naturalization
Service for the District and Territory of
Hawaii,

Defendants.

COMPLAINT

Comes now Chung Young, complainant above-named, and complaining of J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, defendants above-named, alleges as follows:

I.

Complainant alleges that J. Howard McGrath is the Attorney General of the United States and, as such, is the head of the Immigration and Naturalization Service, which is a part of the Department of Justice, and complainant alleges that D. W. Brew-

ster is an executive officer of the Immigration and Naturalization Service and is the District Director of said service for the District and Territory of Hawaii.

II.

Complainant alleges that he is a Chinese person and a citizen of the United States by virtue of his birth in the Territory of Hawaii.

III.

Complainant was born in Honolulu, Territory of Hawaii, in 1901, and is a citizen of the United States by virtue of his said birth.

IV.

Complainant alleges that under the rules and regulations of the Immigration and Naturalization Service a certificate known as "Certificate of Citizenship—Hawaiian Islands" is issued to a Chinese citizen who is about to go abroad as an authentication of his status as a citizen, and such certificate is of great value to the holder thereof in his travels, and said certificates are issued by said service to Chinese citizens for the purpose of facilitating their travels abroad.

V.

Complainant alleges that, being desirous of making a trip abroad, to wit, to China, he applied to the Immigration Service at the Port of Honolulu for a "Certificate of Citizenship—Hawaiian Islands," but the same was denied him on the

ground that he was not a citizen of the United States; complainant duly appealed from said denial to the central office of the Immigration Service, but said appeal was dismissed, and complainant alleges that the refusal to issue him said "Certificate of Citizenship—Hawaiian Islands" is arbitrary and unfair. Complainant further alleges that it is necessary for him to have and obtain said "Certificate of Citizenship—Hawaiian Islands" in order to procure a passport which is needed by him in order to make his trip abroad.

VI.

Complainant alleges that by reason of the arbitrary and unfair denial to him of a "Certificate of Citizenship—Hawaiian Islands," he has been denied the right and privilege he is entitled to as a national of the United States, and that he is entitled to the judgment of this Court declaring him to be a national of the United States.

Wherefore, complainant prays that process issue out of this Court citing defendants to appear and answer this complaint, and after a hearing before this Honorable Court, an order and judgment be entered holding and declaring complainant to be a national of the United States.

Dated: Honolulu, Hawaii, January 25, 1950.

/s/ CHUNG YOUNG.

Territory of Hawaii,
City and County of Honolulu—ss.

Chung Young, being first duly sworn, on oath de-

poses and says: That he is the complainant above-named; that he has read the foregoing complaint, knows the contents thereof, and that the same are true.

/s/ CHUNG YOUNG.

Subscribed and sworn to before me this 25th day of January, A.D. 1950.

[Seal] /s/ JIUNKI MAEDA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires June 30, 1953.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendants:

You are hereby summoned and required to serve upon E. J. Botts, Esq., plaintiff's attorney, whose address is Stangenwald Building, Honolulu, T. H., an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk of Court.

Date: Jan. 26, 1950.

[Title of District Court and Cause.]

UNITED STATES MARSHAL'S RETURN

Received the attached Summons this 26th, day of January, 1950, and the same is returned duly executed this 26th, day of January 26th, 1950, by handing to and leaving with L. H. Haus, Immigration Station, Honolulu, T. H., authorized agent to accept service of process for D. W. Brewster, Director in Charge of Immigration and Naturalization Service, Honolulu, T. H.; by handing to and leaving with Winston C. Ingram, Assistant U. S. District Attorney, for the District of Hawaii, Federal Building, Honolulu, T. H. two certified copies of the said Summons, and by mailing by registered mail return receipt requested two certified copies of the said Summons to J. Howard McGrath, Attorney General of the United States, Washington, D. C.

OTTO F. HEINE.,
U. S. Marshal.

By /s/ GEORGE E. BRUNS,
Deputy.

[Post office return receipt attached.]

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

GENERAL DENIAL

Come now J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Defendants above-named, by Ray J. O'Brien, United States Attorney for the District of Hawaii and denies each and every, all and singular, the allegations contained in the Complaint filed herein.

Dated: Honolulu, T. H., this 24th day of March, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ HOWARD K. HODDICK,
Assistant United States Atty.
District of Hawaii.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT

This cause came on for trial on the 26th day of April, 1950, before the undersigned Judge of the above-entitled Court, E. J. Botts, Esq., appearing for complainant, and Howard K. Hoddick, Esq., appearing for defendants, and from the evidence

adduced the Court makes the following findings of fact:

I.

That complainant was born in Honolulu, Territory of Hawaii, on April 26, 1901, and soon thereafter, he was taken to China by his mother.

II.

That in 1923, complainant returned to the United States as a passenger on the S. S. President Taft and applied for admission as a citizen at the Port of Honolulu; that he was given a hearing before a Board of Special Inquiry, and said Board, after hearing the evidence offered on behalf of complainant, held and found that he was a Hawaiian-born citizen of the United States and was entitled to admission as such, and was admitted, and ever since said time complainant has resided in the United States.

III.

That recently, being desirous of making a trip abroad, complainant applied to the Immigration Service at the port of Honolulu for a "Certificate of Citizenship—Hawaiian Islands," but the same was denied him and, thereafter, complainant appealed to the central office of the Immigration Service at Washington, D. C., but said appeal was dismissed.

IV.

The Court finds from the evidence adduced before it, including the exhibits, that complainant was born

in Honolulu, Territory of Hawaii, on April 26, 1901, and is a citizen of the United States by virtue of his said birth, and that he is entitled to an order and judgment of this Court holding and declaring him to be a national of the United States. An order to this effect will be signed on presentation.

Dated: Honolulu, Hawaii, April 29, 1950.

/s/ D. E. METZGER,

Judge, United States District Court, Territory of Hawaii.

[Endorsed]: Filed May 3, 1950.

In the United States District Court for the
Territory of Hawaii
Civil No. 963

Proceedings Under Nationality Act of 1940
Title 8, Section 903

CHUNG YOUNG,

Complainant,

vs.

J. HOWARD McGRATH, Attorney General of the
United States, and D. W. BREWSTER, Dis-
trict Director, Immigration and Naturalization
Service for the District and Territory of
Hawaii,

Defendants.

ORDER AND JUDGMENT

The above-entitled matter coming on to be heard before the undersigned Judge of the United States District Court for the Territory of Hawaii on the 26th day of April, 1950, E. J. Botts, Esq., appearing for the complainant, and Howard K. Hoddick, Esq., appearing for the defendants, evidence was adduced by the respective parties and, after argument by counsel, the matter was submitted to the Court for his decision, and the Court thereupon rendered his oral decision from the bench, holding and finding that complainant was born in Honolulu, Territory of Hawaii, on April 26, 1901, and was a national and citizen of the United States;

Now, Therefore, pursuant to said oral decision, it is the judgment and declaration of this Court that the said Chung Young is a national and citizen of the United States by virtue of his birth in Honolulu on April 26, 1901.

Dated: Honolulu, Hawaii, April 29, 1950.

/s/ D. E. METZGER,

Judge, United States District Court, Territory of Hawaii.

[Endorsed]: Filed and Docketed May 3, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT UNDER RULE 73(b)

Notice is hereby given that J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, defendants above-named, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order and judgment entered in this action on the third day of May, 1950, declaring that the complainant is a national and citizen of the United States by virtue of his birth in Honolulu on April 26, 1901.

Dated at Honolulu, T. H., this 29th day of June, 1950.

/s/ RAY J. O'BRIEN,

United States Attorney for the District of Hawaii,
and Attorney for J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii.

Defendants.

[Endorsed]: Filed June 29, 1950.

[Title of Cause.]

MINUTE ORDER

It is hereby ordered that J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, defendants in the above-entitled cause, who have heretofore filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit, may have up to and including the 25th day of September, 1950, within which to file and docket the record on appeal with the United States Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H., August 8, 1950.

/s/ D. E. METZGER,

Judge, United States
District Court.

[Endorsed]: Filed August 11, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In making up the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include the following:

1. Complaint, Summons and Marshal's Return.
2. General Denial.

3. Official Reporter's Transcript of Proceedings had on April 26, 1950.

4. Defendants Exhibit No. 1.

5. Findings of Fact dated April 29, 1950.

6. Order and Judgment dated April 29, 1950.

7. Notice of Appeal dated June 29, 1950.

8. Minute Order dated August 8, 1950.

9. This Designation of Record on Appeal.

Dated: Honolulu, T. H., this 5th day of September, 1950.

RAY J. O'BRIEN,
United States Attorney
District of Hawaii.

By /s/ HOWARD K. HODDICK,
Assistant United States Atty.
District of Hawaii.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 6, 1950.

In the United States District Court
for the District of Hawaii

Civil No. 963

Proceedings Under Nationality Act of 1940,
Title 8, Section 903

CHUNG YOUNG,

Complainant,

vs.

J. HOWARD McGRATH, Attorney General of
the United States, and D. W. BREWSTER,
District Director, Immigration and Naturali-
zation Service for the District and Territory
of Hawaii,

Defendants.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, which came on for
hearing April 26, 1950, Honolulu, T. H.

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

E. J. BOTTS, Esq.,
Stangenwald Building, Honolulu, T. H.,
Appearing for the Complainant.

HOWARD K. HODDICK, Esq.,
Assistant United States Attorney,
Appearing for the Defendants.

Honolulu, T. H., April 26, 1950

The Clerk: Civil No. 963, Chung Young vs. J. Howard McGrath, for trial.

Mr. Botts: Ready, your Honor. This is a petition for a certificate of citizenship, or judgment of citizenship.

Would you sit up there in that little chair, please.

The Clerk: Do you want me to swear him in now?

Mr. Botts: I think we had better.

CHUNG YOUNG

called as a witness on behalf of the Complainant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Botts:

Q. Your name is Chung Young? A. Yes.

Q. And where were you born?

A. Honolulu.

Q. And what date were you born?

A. 1901, April 26.

(Testimony of Chung Young.)

Q. And you are a citizen of the United States because of your birth here; is that correct?

A. Yes.

Mr. Hoddick: Objection. Move to strike the answer [1] of the witness.

Mr. Botts: OK, if Counsel wants it I have no objection.

Mr. Hoddick: It is a conclusion of the witness.

Mr. Botts: You were born here. It was an unnecessary question. I don't see why it should be objected to. The Constitution says he is a citizen.

The Court: All right.

Q. (By Mr. Botts): When you were a baby, what happened to you? Where did you go?

A. One year old my mother bring me to China.

Q. To China? A. Yes.

Q. And when did you come back from China?

A. Me?

Q. Yes.

A. 1923, October, around 26th, but the date I don't remember. I cannot remember so sure, but on the President Taft.

Q. Sometime in October, 1923, as near as you can remember? A. Yes.

The Court: Twenty-three or six?

The Witness: Twenty-three or twenty-six, but I cannot remember so sure. [2*]

Q. (By Mr. Botts): Anyway, when you came

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Chung Young.)

back, you had a hearing down at the immigration station? A. Yes.

Q. You had a trial down there? A. Yes.

Q. And witnesses appeared for you?

A. Yes.

Q. And testified you were born here?

A. Yes.

Q. And then you were admitted as a citizen, were you? A. Yes.

Q. And you have lived here ever since?

A. Yes.

Q. Now, some time ago you asked the immigration people to give you a certificate of citizenship to go to China; is that correct? A. Yes.

Q. Is that right? A. Yes.

Q. You want to go to China? A. Yes.

Q. And they have refused to give that to you?

A. Yes.

Q. And you have brought this paper so that you can get a certificate of citizenship? [3]

A. Yes.

Mr. Botts: Cross-examine.

Mr. Hoddick: May it please the Court, I would like to file something in the nature of a pre-trial memorandum which lists authorities on the question of burden of proof.

Cross-Examination

By Mr. Hoddick:

Q. Mr. Young, who went back to China with you in 1902?

A. 1902: 1902 I went China. That is June 3.

(Testimony of Chung Young.)

Q. I say, Who went with you?

A. My mama.

Q. Just your mother. And where did you go in China?

A. Canton, Lung Chee Village.

Q. When did you return to the United States?

A. 1923, October 26, maybe 26, President Taft steamer.

Q. Did you live in Canton the entire time that you were in China, from 1902 to 1923?

A. Beg pardon?

Q. Did you live in Canton the entire time you were in China? A. Yes.

Q. With your mother?

A. My mother stay in China, too, but now the old lady die.

Q. Whom do you mean by that? [4]

The Court: Now the old lady died.

Mr. Hoddick: Oh.

The Witness: Yes.

Q. (By Mr. Hoddick): What boat did you go to China on, do you know?

A. My mother told me it was the Coptic.

Q. What was your father's name, Mr. Young?

A. My father, Lai Yung.

Q. Where was your father when you went back to China in 1902?

A. My father stay here, die here, die in this Island when I went back about four months. I go China about four months old—about four months long and he die here.

(Testimony of Chung Young.)

Q. He died four months before you went to China?

A. No, I went China. After I went China about four months, then he die here.

Q. Do you know why your father didn't go back to China with you?

A. I don't know. Maybe he sick, I don't know. This I don't know. My mother never mentioned about that.

Q. Did you ever submit to the Immigration and Naturalization Service a certificate of death from the Bureau of Vital Statistics, Honolulu, covering your father's death?

A. The interpreter better make sure for me so I understand clear. Could you? [5]

Mr. Hoddick: I will repeat it.

(Harry K. C. Ching was thereupon sworn to act as interpreter, and the witness testified further, through the interpreter, as follows):

Q. (By Mr. Hoddick): Now, Mr. Young, did you ever submit to the Immigration and Naturalization Service here in Honolulu a certificate of death issued by the Territory of Hawaii Bureau of Vital Statistics covering your father's death?

A. Yes.

Q. Now, showing you certificate of death No. A-502, dated December 6, 1948, I ask you if this is the certificate of death which you submitted to the Immigration Service.

A. Yes.

(Testimony of Chung Young.)

Q. And this certificate of death relates to your father?

Mr. Botts: Objected to as calling for a conclusion of the witness, if your Honor please. It is an unfair question in the first place. This boy left here when he was one year old or less and came back when he was 24 and apparently got some death certificate which he thought appertained to his father, and I assume it does. I don't know anything about it, but the most he could do is say he got that from the Board of Health, and it covered his father's death, and submitted it to the Immigration Service [6]

Mr. Hoddick: I will withdraw the question.

Q. (By Mr. Hoddick): Were you ever advised as to the date when your father died?

A. Before I came here my witnesses told me, had mentioned it to me.

Q. What did they mention to you?

A. Told me when he died.

Q. Were your witnesses in China at that time?

A. In here, over here.

Q. How did they advise you, by letter?

A. When I came here I asked them.

Q. Had you been in correspondence with these witnesses before you came here?

A. My mother corresponded with them to help me, execute a paper for me to come back here.

Q. And what date did these witnesses say your father had died? A. 1902, September 22.

Q. And your father's name was Lai Yung?

(Testimony of Chung Young.)

A. Yes.

Q. And he died in Honolulu? A. Yes.

Q. And this certificate which you just looked at, is it one which you gave to the Immigration Service as covering your father's death? [7]

A. Yes.

Mr. Botts: It has been asked and answered. He has already said it was.

Mr. Hoddick: No further questions.

Mr. Botts: Unless the Court has something, that is all. That is the case, your Honor.

(Witness excused.)

Mr. Hoddick: Mr. Lee, will you take the stand, please.

ROBERT E. LEE

called as a witness on behalf of the Defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

Direct Examination

By Mr. Hoddick:

Q. Mr. Lee, will you give your full name, please.

A. Robert E. Lee.

Q. And where are you employed?

A. United States Immigration and Naturalization Service, Honolulu, T. H.

Q. In what capacity?

A. As investigator.

(Testimony of Robert E. Lee.)

Q. And how long have you been employed there? A. Since February of 1948.

Q. And you have access to all of the files of the Immigration and Naturalization Service in Honolulu? A. Yes.

Q. Are you familiar with the application of Chung Young for a certificate of citizenship, Hawaiian Islands? A. I think so.

Q. Did you review the proceedings covering Chung Young's admission to the United States in 1923? A. Did I review them?

Q. Yes. A. Yes.

Q. Who appeared as witnesses for Chung Young at that time?

A. There were three persons. One was Hu Tiam, one was Down Tong Chin, and I do not recall the name of the third witness.

Q. Did you review the files of the Immigration Service to find out whether these witnesses had appeared in behalf of other applicants for admission to the United States?

Mr. Botts: Objected to as incompetent, irrelevant, and immaterial. We are not concerned, your Honor, with what they have done; whether they have been witnesses in other cases or not has nothing to do with the issue here. We are concerned with their testimony here, their appearance and their testimony here. That way of a back door attack upon witnesses seems to be the favorite of the Immigration Service and is [9] condemned by the courts, repeatedly condemned by them. Wit-

(Testimony of Robert E. Lee.)

nesses appeared, they were questioned as to their knowledge of this young man's birth here. I assume Counsel wants to say they were witnesses in some other doubtful case. That is the usual line, but you can't deny this man's citizenship on that account. If we pursue this, we will find out both of these witnesses are dead and can't speak for themselves. This man is here. He has testified here. If they have any evidence to show he was not born here, we will be glad to have them produce it, but not this back door method of un-American approach to an issue.

Mr. Hoddick: May it please the Court, I have frequently heard Mr. Botts urge this is an improper approach, which has been repeatedly overruled by the courts. I have failed to hear him cite an authority. Again I refer to the case of Lum Mon Sing vs. United States, 124 Fed (2d) 21. I refer the Court to that case.

Mr. Botts: That is that same case we had last time. That relates——

Mr. Hoddick: Just a second, Mr. Botts. This was an appeal taken from judgment dismissing a petition for a writ of Habeas Corpus and in this case the court said, in affirming the dismissal of the petition for the writ—and Mr. Botts did appear as counsel:

“However, reference to other files of the Board where the same witnesses had testified was sufficient to justify the Board in viewing the evidence with

(Testimony of Robert E. Lee.)

suspicion, because of the nature of the cases in which they had testified. Viewing such evidence with suspicion, the Board was entitled to give but little weight to it and to hold that it was insufficient to carry appellant's burden."

Now, the plaintiff in this case is confronted with the same burden of establishing his citizenship as he was here, as this man was when he petitioned for a writ of Habeas Corpus, that is, in throwing out the Immigration Authorities' decision on that petition. Now, this means of showing that the plaintiff has not sustained the burden of proof, that his 1923 admission is to be regarded with doubt and is not to be given probative value here, is certainly proper and the Ninth Circuit Court so held in that case.

Mr. Botts: Now, your Honor, as I recall, I pointed out the differences. Lum Mon Sing had gone out of the United States and had reapplied for admission. When he went out of the United States, he consented that upon his return, the court said, he submit his rights to the decision of the immigration authorities. They there have a right, where he is applying for admission, to consider all collateral records. We don't deny that. We are here under the Nationality Act of 1940, which was not even in existence then, and we have a right to come in here, your Honor, and have this [11] case decided by competent evidence, and how Counsel can site an exclusion case, which that is, and say it is the same as a declaratory proceeding such as

(Testimony of Robert E. Lee.)

this is beyond me. They are just as different as day from night.

Mr. Hoddick: A different type of proceeding. It has always been my understanding the plaintiff in a declaratory damage suit bears the burden of proof.

Mr. Botts: He does, and we have assumed it, your Honor, but when you go out of the country, you are consenting that the immigration people look at a thousand files if they want.

The Court: It seems rather far-fetched to me and so much so as to be immaterial in this case.

Mr. Hoddick: May I note an exception to the Court's ruling.

The Court: Yes.

Q. (By Mr. Hoddick): Mr. Lee, showing you Certificate of Death No. A-502, dated December 6, 1948, covering the death of one Lai Yung, which was previously shown to the plaintiff, I ask you if you have examined the records of the Immigration and Naturalization Service for the purpose of determining whether other applicants for admission to the United States have claimed that same death record.

Mr. Botts: We object to that on the same ground, your Honor. This man has testified that that is his father's [12] death record. Now, if Counsel has any evidence to prove it is not his death record, we will welcome it, but to say that some other Chinese have tried to encroach upon that or tried to use it as their own comes in the same class

(Testimony of Robert E. Lee.)

as this other objection. We object to that, if your Honor please. It doesn't make any difference. We are not bound by what other Chinese have done unless they can connect us up with it. If Counsel is able to show that death record does not belong to this man, we will be glad to have him do it, but to say some other Chinese, who are strangers to us, have laid some claim to it is immaterial, a vicarious way of handling the situation.

Mr. Hoddick: I have the same answer to that argument as I did on the previous question.

The Court: Objection sustained.

Mr. Hoddick: Note an exception.

The Court: Exception noted.

Q. (By Mr. Hoddick): Mr. Lee, giving you the Chinese calendar date KS 28 fourth month twenty-seventh day, what would our equivalent calendar date be?

A. KS 28 fourth month twenty-seventh day?

Q. Yes. A. June 3, 1902.

Q. Mr. Lee, you were the Immigration inspector who reviewed Chung Young's application on January 12, 1949, for a [13] certificate of citizenship, Hawaiian Islands? A. Yes, sir.

Q. And what date did he tell you that he departed from Honolulu for China? Would you like to look at the transcript to refresh your recollection?

A. If I may. (Examining document) KS 28 fourth month twenty-seventh day.

Q. Which is June 3, 1902?

(Testimony of Robert E. Lee.)

Mr. Botts: What was that? Fourth month——

Mr. Hoddick: Fourth month twenty-seventh day.

Mr. Botts: What KS?

Mr. Hoddick: Twenty-eight.

The Court: What?

Mr. Hoddick: KS 28, your Honor. That is the date which this man stated, on the hearing, was the date he departed. Now, what was the name of the ship which he said he left on?

The Witness: SS Coptic.

Q. (By Mr. Hoddick): Mr. Lee, have you examined the manifest covering the departure of persons from Honolulu on the SS Coptic on June 3, 1902? A. Yes.

Q. And was the plaintiff's name included anywhere on the list of persons departing from Honolulu at that time? A. I did not find it. [14]

Q. Was the name of the plaintiff's mother included anywhere?

A. I did not find it either.

Q. It does not appear on the manifest?

A. No, sir.

Mr. Botts: He said he couldn't find it. He didn't say it didn't appear. We object to that as leading and suggestive.

Q. (By Mr. Hoddick): You brought with you that manifest? A. Yes.

Q. Will you re-examine it to see if you can find either the name of the plaintiff or the name of his mother. A. Yes.

(Testimony of Robert E. Lee.)

Mr. Botts: If you can make anything out of that, you are good.

Q. (By Mr. Hoddick): Does the name of either the plaintiff or his mother appear in that manifest? A. I do not find it there.

Q. During the course of the examination, Mr. Lee, did the plaintiff tell you what the name of his mother was?

A. He said her name was Hung She.

Q. And that is the name which you were searching for on the manifest? A. That and son.

Q. Yes. Where did you obtain that manifest?

A. It is in the records of the Immigration Service at Honolulu.

Q. Is that manifest sworn to?

A. May I look. I believe it is.

The Court: What was the question?

Mr. Hoddick: Is that manifest sworn to? Your Honor, I would prefer not to offer it in evidence because it is the only record which the Immigration Service has.

A. Yes. Wait a minute. Yes, it is.

Q. (By Mr. Hoddick): By whom?

A. By the master of the vessel. The signature is hard to read.

Mr. Hoddick: No further questions.

Cross-Examination

By Mr. Botts:

Q. Mr. Lee, you have been handling Chinese cases for some time, haven't you, at the Immigration station? A. Approximately two years.

(Testimony of Robert E. Lee.)

Q. And you know the habit and practice of Chinese having various names?

A. They do have various names, yes.

Q. I am going to ask you to return to this manifest. You said this boy was not on that manifest. You tell me the name of this individual on this page here (indicating). You [16] see "Mrs. J. Wada" and beneath "and child"; what is the child's name? A. I do not know.

Q. All right. Now down here we have later on the same page "Mrs. ——" Maybe it is Moto; we can't make out. Beneath that we have two children, "child," "child." What are their names?

A. I do not know.

Q. And down here we have another one on the last page, "boy, one"; what is that boy's name?

A. I do not know.

Q. We have another one named "girl, three"; what is that girl's name? A. I do not know.

Q. Well, then, it is true, is it not, that these old manifests did not list the names of every individual passenger aboard?

Mr. Hoddick: Objection. It is argumentative.

Mr. Botts: It summarizes his testimony. He has just stated it.

Mr. Hoddick: Argumentative.

Mr. Botts: If Counsel wishes to object——

The Court: Well, it is objected to.

Mr. Hoddick: It is very obvious that is so. Your Honor, I think perhaps I had better offer this in evidence, [17] with a request that we be permitted

(Testimony of Robert E. Lee.)

to withdraw it after the termination of these proceedings, or else have some kind of a facsimile prepared of this particular manifest.

Mr. Botts: Well, any way Counsel wants to handle it is all right with me.

The Court: Is there anything in it you want to point out to the Court?

Mr. Hoddick: I want to point out that it is perfectly obvious from the face of the manifest that where a person's name is listed with "child" underneath, that that child is the child of the person whose name is directly above the word "child," or "children."

The Court: What makes it obvious?

Mr. Hoddick: Your Honor would have to examine the manifest, I believe, for that to be apparent.

Mr. Botts: The records of decisions in this court and the Ninth Circuit Court are filled with references to the fact that these old manifests are neither complete nor exact. They have very doubtful probative value for anything, negatively or affirmatively.

Mr. Hoddick: Are you testifying now, Mr. Botts?

Mr. Botts: You say you want to submit it, and I am simply saying it has no evidentiary value. It is not complete. It doesn't lend any light on the issue here. This man doesn't know what name this woman departed under. He [18] knows the Chinese have many names. We have a lot of children

(Testimony of Robert E. Lee.)

lumped in there. I have picked out five or six, no name given to them.

Mr. Hoddick: You will notice, Mr. Botts, where the proper name is given, it is written out at the margin, while the name "boy," "girl," or "child" is indented underneath.

Mr. Botts: What difference does that make? Moreover, your Honor, it is not material whether he left on this sailing of the Coptic or another sailing. He departed and returned and I don't see what evidentiary value there is in it.

Mr. Hoddick: This plaintiff has testified twice, your Honor, that he left——

Mr. Botts: On the basis of hearsay testimony given.

Mr. Hoddick: The statement that he was born in Hawaii is hearsay testimony.

Mr. Botts: It is admissible.

Mr. Hoddick: So is this for the same reason.

Mr. Botts: It is competent.

The Court: About how frequently did the Coptic make a trip to and from China, round trip? I remember the Coptic.

Mr. Botts: It took between two and half and three months, I understand, your Honor. [19]

Mr. Hoddick: That is probably correct, your Honor.

The Court: I believe that is correct.

Mr. Botts: I have no further questions.

The Court: Your offer is to put that manifest in?

Mr. Hoddick: That is right, your Honor, with leave to withdraw it.

(Testimony of Robert E. Lee.)

The Court: With the privilege of withdrawing it. All right, you may.

The Clerk: Defendant's Exhibit No. 1.

(Thereupon, the document above referred to was received in evidence as Defendant's Exhibit No. 1.)

Mr. Botts: I have no further questions, Mr. Lee.

Mr. Hoddick: No further questions.

The Court: Pass that up to me. (Handed to Court.) Does this book contain only the manifests of the SS Coptic or does it contain manifests of various steamers?

Mr. Hoddick: Your Honor, it contains manifests covering all steamers which left Honolulu during the period covered on the outside of the volume.

Mr. Botts: May I ask Mr. Lee another question, your Honor.

The Court: Yes.

Q. (By Mr. Botts): Mr. Lee, you are familiar with the record of the Board of Special Inquiry of 1923 which admitted this petitioner, are you not?

A. Reasonably so, I think.

Q. You recall, do you not, that the Board of Special Inquiry which admitted this applicant in 1923 had examined this manifest and noted at the hearing that they did not find his departure on that?

A. That's right.

Mr. Botts: I would like to have you produce a copy of that record, if you will, please, of 1923.

Mr. Hoddick: May it please the Court, I would

(Testimony of Robert E. Lee.)

like to make a belated objection and move to strike the answer of this witness on the grounds it is beyond the scope of proper cross-examination. I asked no questions of this witness concerning the 1923 admission.

Mr. Botts: It is kind of strained. He produces the manifest of 1923 to draw the inference because the boy's name was not on there that he hadn't left.

Mr. Hoddick: That is the 1902.

Mr. Botts: I want to show that the board which admitted the boy knew that these things were incomplete and they took that into account in weighing the evidence.

Mr. Hoddick: I object that whatever the Board knew or said on that score is immaterial.

Mr. Botts: It certainly shows that it is a late time now to bring that up, after this man's witnesses are all dead, after 27 years, to say, "We can't find this man's name [21] on the manifest," when the very board that certified to his citizenship and had the statutory power to determine it in the first instance knew that fact.

The Court: What was the objection?

Mr. Hoddick: Objection, your Honor, on two grounds: (1) that it is outside the scope of proper cross-examination.

The Court: What is it you are objecting to?

Mr. Hoddick: I move to strike the answers of this witness concerning the 1923 hearing and I objected to the request of this witness to produce the 1923 transcript on the grounds it is outside the scope

(Testimony of Robert E. Lee.)

of the direct examination, on the grounds that the conclusions of the Board at that time are immaterial. It is up to this Court to determine whether this man is a citizen or not, and whatever the conclusions of the Board were in 1923——

Mr. Botts: He has asked if he is familiar with the whole record, if he had reviewed it and gone over it and can tell about it.

Mr. Hoddick: I didn't go over this record.

The Court: You wish the transcript to be presented to the witness?

Mr. Botts: We want to offer it in evidence. I asked him to produce it, your Honor. I thought it should be before the Court. In other cases the Government has always produced the landing record, the hearing of the Board of [22] Special Inquiry, and I thought it should be in this case, especially for the fact that the Board had taken cognizance of the fact that they didn't find the woman's or boy's name on the manifest, but, notwithstanding, they admitted him because of the direct evidence of the witness.

The Court: The objection is overruled.

Mr. Botts: Counsel has offered to hand me, your Honor, the 1923 landing record of this petitioner, which we offer in evidence, and I wish to call to your Honor's attention the Board's statement: "Note: The ss Coptic—" It is the last page. "—departed June 3rd 1902 which is 4th month 27th day KS 28 but the name of the applicant's mother or applicant is not on the list."

(Testimony of Robert E. Lee.)

Mr. Hoddick: Your Honor, I object to the offer in evidence on the grounds it is not material.

The Court: I am rather doubtful of the materiality, as I was of the Coptic's manifest, but having admitted that I admit this.

The Clerk: Plaintiff's Exhibit A.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit A.)

Mr. Botts: That is all, Mr. Lee.

Mr. Hoddick: That is all. Thank you.

(Witness excused.)

Mr. Hoddick: That is our case, your Honor. [23]

Mr. Botts: That is the case for both sides, your Honor.

The Court: Well, it is my opinion from the evidence that the petitioner is entitled to a certificate.

Mr. Botts: Thank you, your Honor.

The Court: I find nothing to overthrow the evidence submitted that he was born here and it is the judgment of the Court that a certificate should be issued.

Mr. Botts: Thank you, your Honor, I will prepare such order.

(Thereupon, at 11:10 a.m., the hearing in the above-entitled matter was adjourned.) [24]

CERTIFICATE

I, Lucille Hallam, Official Reporter, United States District Court, District of Hawaii, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil 963, Chung Young vs. J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, etc., April 26, 1950, before Hon. Delbert E. Metzger, Judge.

July 17, 1950.

/s/ LUCILLE HALLAM.

[Endorsed]: Filed September 6, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD ON
APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following original pleadings, transcript of proceedings, and exhibits of record in said cause:

Complaint and Summons,

General Denial,

Findings of Fact,

Order and Judgment,

Notice of Appeal to United States Court of Appeals for the Ninth Circuit under Rule 73(b),

Minute Order,

Designation of Record on Appeal,

Transcript of Proceedings (April 26, 1950),

Defendants' Exhibit No. 1.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of September, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 12688. United States Court of Appeals for the Ninth Circuit. J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Appellants, vs. Chung Young, Appellee. Transcript of Record. Appeal from the United States District Court for the Territory of Hawaii. Filed September 19, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Upon Appeal From the District Court of the
United States for the District of Hawaii

CHUNG YOUNG,

Complainant-Appellee,

vs.

J. HOWARD McGRATH, Attorney General of the
United States, and D. W. BREWSTER, Dis-
trict Director, Immigration and Naturalization
Service for the District and Territory of Ha-
wail,

Defendants-Appellants.

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANTS-APPELLANTS
ON APPEAL

Comes now J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Defendants-Appellants in the above-entitled cause, by Ray J. O'Brien, United States Attorney for the District of Hawaii, and pursuant to the provisions of Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, hereby states that the Defendants-Appellants in taking this appeal rely upon the following points:

1. The judgment of the United States District Court for the District of Hawaii is not supported by a preponderance of the evidence.

2. The United States District Court for the District of Hawaii erred when it refused to permit witness Robert E. Lee to testify concerning the appearance of Complainant-Appellee's witnesses in doubtful cases before other Boards of Special Inquiry.

3. The United States District Court for the District of Hawaii erred when it refused to permit witness Robert E. Lee to testify concerning the use of the death record of the Complainant-Appellee's purported father by other applicants for admission to the United States.

By reason of said error and other manifest errors appearing in the record designated herein, the judgment should be set aside.

Dated: Honolulu, T. H., this 5th day of September, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii,

By /s/ HOWARD K. HODDICK,
Assistant United States Atty.,
District of Hawaii.

[Endorsed]: Filed September 19, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Come now J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Defendants-Appellants in the above-entitled cause, by Ray J. O'Brien, United States Attorney for the District of Hawaii, and hereby designate for inclusion in the printed record on appeal, the following:

1. Complaint, Summons and Marshal's Return.
2. General Denial.
3. Official Reporter's Transcript of Proceedings had on April 26, 1950.
4. Defendants Exhibit No. 1.
5. Findings of Fact dated April 29, 1950.
6. Order and Judgment dated April 29, 1950.
7. Notice of Appeal dated June 29, 1950.
8. Minute Order dated August 8, 1950.
9. Designation of Record on Appeal.
10. Statement of Points to Be Relied Upon by Defendants-Appellants on Appeal.
11. This Designation of Record to Be Printed on Appeal.

Dated: Honolulu, T. H., this 5th day of September, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii,

By /s/ HOWARD K. HODDICK,
Assistant United States Atty.,
District of Hawaii.

[Endorsed]: Filed September 19, 1950.

No. 12,688

IN THE

United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

BRIEF FOR APPELLANTS.

RAY J. O'BRIEN,

United States Attorney for the District of Hawaii,

HOWARD K. HODDICK,

Assistant United States Attorney for the District of Hawaii,

FRANK J. HENNESSY,

United States Attorney for the Northern District of California,

Attorneys for Appellants.

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No. 12,688

IN THE
United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE PLEADINGS AND FACTS.

This is an appeal by J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Defendant-Appellants, from a judgment entered by the United States District Court for the District of Hawaii in favor of Chung Young, Plaintiff-Appellee. Appellee brought suit in the District Court on Janu-

ary 25, 1950 for a judgment declaring him to be a national of the United States. (R. 2-6.) The Appellants filed a general denial on March 24, 1950. (R. 7.)

Jurisdiction of the District Court was invoked under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. § 903. Findings of Fact and the Judgment of the District Court were entered on April 29, 1950 and filed on May 3, 1950. (R. 7-10.) The Appellants filed a Notice of Appeal from that judgment to this Honorable Court on June 29, 1950. (R. 11.) On August 8, 1950 the District Court issued an order extending the time for perfecting the record on appeal until September 25, 1950. (R. 12.)

The jurisdiction of this Court is invoked under the provisions of §§ 1291 and 1294 of Title 28, U.S.C.

STATEMENT OF THE CASE.

At the trial of this cause, had on April 26, 1950 the Appellee testified in support of the allegations contained in his complaint that he had been born in Honolulu on April 26, 1901 (R. 15), that his mother took him to China on June 3, 1902 on a ship called the Coptic (R. 16-18), that he returned to Honolulu on October 26, 1923 and was admitted to the United States as a citizen thereof at that time (R. 16, 17), and that the Immigration and Naturalization Service had denied his application for a certificate of citizenship, actually a Certificate of Citizenship-Hawaiian Islands. (R. 17.)

On cross-examination the Appellee identified Certificate of Death No. A-502, dated December 6, 1948, covering the demise of one Lai Young as the certificate of his father's death which he had submitted to the Immigration and Naturalization Service. (R. 19-21, 25.)

The Appellee called no other witnesses.

The Appellants endeavored to prove that other applicants for admission to the United States had claimed the same death record claimed by the Appellee, that is, they also claimed that Lai Young was their father. The District Court refused to admit this evidence. (R. 25, 26.) The District Court also refused to admit evidence offered by the Appellants that witnesses who had testified in support of Appellee's admission to the United States in 1923 had also testified in support of the admissions of numerous other persons whom the Immigration and Naturalization Service had probable cause to believe were not citizens of the United States. (R. 22-25.)

The Appellants offered and there was received in evidence as Defendant's Exhibit No. 1 the manifest listing all passengers who sailed on June 3, 1902 from Honolulu to China on the Coptic. (R. 32.) This exhibit is a part of the record on appeal and neither the name of the Appellee nor the name of his mother (Hung She) (R. 28), appears on the manifest.

SPECIFICATION OF ERRORS.

1. The District Court erred when it refused to admit the testimony of Appellants' witness Robert E. Lee that witnesses who testified in support of the Appellee's admission to the United States in 1923 had also testified in support of the admission of numerous other applicants whom the Immigration and Naturalization Service had probable cause to believe were not citizens of the United States.

Testimony of Robert E. Lee (R. 22-25):

"Q. Did you review the files of the Immigration Service to find out whether these witnesses had appeared in behalf of other applicants for admission to the United States?

Mr. Botts. Objected to as incompetent, irrelevant, and immaterial. We are not concerned, your Honor, with what they have done; whether they have been witnesses in other cases or not has nothing to do with the issue here; we are concerned with their testimony here, their appearance and their testimony here. That way of a back door attack upon witnesses seems to be the favorite of the Immigration Service and is condemned by the courts, repeatedly condemned by them. Witnesses appeared, they were questioned as to their knowledge of this young man's birth here. I assume Counsel wants to say they were witnesses in some other doubtful cases. That is the usual line, but you can't deny this man's citizenship on that account. If we pursue this, we will find out both of these witnesses are dead and can't speak for themselves. This man is here. He has testified here. If they have evidence to show he

was not born here, we will be glad to have them produce it, but not this back door method of un-American approach to an issue.

(Argument by Mr. Hoddick and by Mr. Botts.)

The Court. It seems rather far-fetched to me and so much so as to be immaterial in this case.

Mr. Hoddick. May I note an exception to the Court's ruling?

The Court. Yes."

2. The District Court erred when it refused to admit the testimony of Appellants' witness Robert E. Lee that the death record of Lai Young, claimed by the Appellee, had also been claimed by numerous other applicants, not related to the Appellee, for admission to the United States.

Testimony of Robert E. Lee (R. 25, 26):

"Q. (by Mr. Hoddick.) Mr. Lee, showing you Certificate of Death No. A-502, covering the death of one Lai Young, which was previously shown to the plaintiff, I ask you if you have examined the records of the Immigration and Naturalization Service for the purpose of determining whether other applicants for admission to the United States have claimed that same death record?

Mr. Botts. We object to that on the same ground, your Honor. This man has testified that that is his father's death record. Now, if Counsel has any evidence to prove it is not his death record, we will welcome it, but to say that some other Chinese have tried to eneroach upon that or tried to use it as their own comes in the same class as this other objection. We object to that,

if your Honor please. It doesn't make any difference. We are not bound by what other Chinese have done unless they can connect us up with it. If Counsel is able to show that death record does not belong to this man, we will be glad to have him do it, but to say some other Chinese, who are strangers to us, have laid some claim to it is immaterial, a vicarious way of handling the situation.

Mr. Hoddick. I have the same answer to that argument as I did on the previous question.

The Court. Objection sustained.

Mr. Hoddick. Note an exception.

The Court. Exception noted.

3. The District Court erred in that its judgment is not supported by a preponderance of the evidence.

ARGUMENT.

1. THE JUDGMENT OF THE DISTRICT COURT IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

In a declaratory judgment suit brought under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, the plaintiff has the burden of proof and must prove his case by a preponderance of the evidence. *Bauer v. Clark*, 161 F. (2d) 397, 400 (1947—7 CCA); *Lum Mon Sing v. United States*, 124 F. (2d) 21, 23 (1941—9 CCA); *Gan Seow Tung v. Clark*, 83 F. Supp. 482, 486 (1949—S.D.Calif.).

The admission of the Appellee to the United States as a citizen thereof in 1923 is not *prima facie* evidence that he is a citizen or national of the United

States. *Lum Mon Sing v. United States*, supra at 23; *Mock Kee Song v. Cahill*, 94 F. (2d) 975, 977 (1938—9 CCA); *United States ex rel Vajta v. Watkins*, 88 F. Supp. 51, 54 (1949—S.D.N.Y.). In the *Lum Mon Sing* case this Court said:

“First. Appellant contends that the determination of citizenship in 1922 created a prima facie case which could only be overcome by evidence. The immigration officials in 1941 considered its decision of 1922. It was required to do no more, and the burden of proof was still on appellant in 1941.”

In the instant case the only evidence offered by the Appellee in support of his claim to United States citizenship was his own testimony (R. 15-21) and the record of the Board of Special Inquiry which admitted him in 1923. (R. 34.) The attention of the Court is called to the Appellee's testimony that on June 3, 1902 he departed from Honolulu for China with his mother, Hung She, on the Coptic. (R. 16-18.) Defendants' Exhibit No. 1, the manifest listing all passengers on that trip of the Coptic and which is a part of the record on this appeal, reveals that neither the Appellee nor his mother was a passenger aboard the Coptic when it departed from Honolulu on June 3, 1902. The record covering the Appellee's admission to the United States in 1923 was, of course, considered by the immigration officials when the Appellee applied for a Certificate of Citizenship-Hawaiian Islands (R. 22) but said record has not been made a part of this record on appeal.

Given the interest of the Appellee in this suit and the discrepancy between his testimony and the manifest it is submitted that the Appellee did not sustain the burden of proof.

2. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE WHICH WOULD HAVE IMPEACHED THE CREDIBILITY OF WITNESSES WHO TESTIFIED IN SUPPORT OF THE APPELLEE'S 1923 ADMISSION.

The Appellants offered evidence which would have proved that witnesses who testified in support of the Appellee's admission to the United States were "professional" witnesses who had testified in support of the admission of numerous other persons whom the Immigration and Naturalization Service had probable cause to believe are not citizens of the United States. (R. 22-25.) This evidence would have shown that Appellee's 1923 admission was entitled to little weight. Such evidence was material and its exclusion constituted error prejudicial to the Appellants. *Lum Mon Sing v. United States*, supra at 21.

3. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE WHICH WOULD HAVE IMPEACHED THE APPELLEE'S CREDIBILITY.

The Appellee claimed that he was born in Honolulu, that his father was one Lai Young, and in support of that claim he submitted to the Immigration and Naturalization Service the death certificate of Lai Young, his purported father. (R. 18-21.) The Appellants of-

ferred evidence that numerous other persons, unrelated to the Appellee, had also claimed that the same death certificate related to the death of their fathers. This testimony which would have reflected on the credibility of the Appellee was not admitted in evidence by the District Court. (R. 25-26.) This evidence was material and the refusal of the District Court to admit it was prejudicial error.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be set aside and reversed.

Dated, Honolulu, T. H.,
December 22, 1950.

RAY J. O'BRIEN,

United States Attorney for the District of Hawaii,

HOWARD K. HODDICK,

Assistant United States Attorney for the District of Hawaii,

FRANK J. HENNESSY,

United States Attorney for the Northern District of California,

Attorneys for Appellants.

No. 12,688

IN THE
United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

E. J. BOTTS,

Stangenwald Building, Honolulu, Hawaii,

Attorney for Appellee.

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No. 12,688

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. HOWARD MCGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTION.

Title 8 U.S.C. (Nationality Act of 1940) Section 903 confers on the District Court jurisdiction in this matter, and Title 28 U.S.C. Section 225 grants appellate jurisdiction to this court.

STATEMENT OF FACTS.

This proceeding was brought in the United States District Court for the Territory of Hawaii by Chung Young under the provisions of the Nationality Act of 1940 (8 U.S.C. 903) for a judgment declaring him to be a citizen of the United States. He alleged the Immigration Service had refused to issue him a "Certificate of Citizenship—Hawaiian Islands", which he needed in connection with his projected trip abroad (R. p. 3). These certificates are issued to citizens residing in the Territory¹ as evidence of citizenship, on a showing they intend to depart temporarily from the United States.

Appellee was admitted by a Board of Special Inquiry of the Immigration Service in 1923 as a Hawaiian-born citizen after a hearing in which Appellee and three witnesses testified (R. p. 17; Appellee's Exhibit "A"). He has resided in the Territory since his admission (R. p. 17).

¹"Citizens of the United States residing in Hawaii; issuance of certificates. A resident of Hawaii who intends to depart temporarily from that Territory shall be granted a 'Certificate of Citizenship—Hawaiian Islands' by the officer in charge at Honolulu, Hawaii, upon proving to the satisfaction of that official that he is a citizen of the United States, a bona fide resident of the Territory of Hawaii and that he actually intends to depart temporarily. Such certificates may be retained by the person to whom issued. If the officer in charge at Honolulu is not satisfied that the applicant is entitled to this certificate, the application shall be denied and the applicant notified that he may appeal to the Attorney General from the adverse decision. Ten days will be allowed within which to file notice of appeal with such immigration officer. All evidence which was submitted in support of the application shall constitute the record and shall be forwarded to the Central Office in cases where appeals are taken."

Code of Federal Regulations 128.5.

On the trial Appellee testified to his Hawaiian birth and caused the record of his 1923 hearing before a Board of Special Inquiry to be put in evidence.² The Appellants offered no evidence that Appellee was not born in the Territory and did not deny they had refused to give him the certificate applied for. The trial judge found from the evidence adduced that Appellee was born in Honolulu April 26, 1901, was a citizen of the United States and was entitled to a judgment to that effect (R. p. 9), and in due course such a judgment was entered (R. p. 10).

SUMMARY OF ARGUMENT.

1. Counsel for Appellants on the trial called an Immigration Inspector and asked him (a) if the witnesses who testified for Appellee before a Board of Special Inquiry in 1923 had also testified for other applicants for admission, and (b) if the Board of Health record covering death of Lai Yung, the father of Appellee, had been claimed by others seeking admission as applying to their father. To each of these questions counsel for Appellee objected as being immaterial, and the objections were sustained (R. pp. 25 and 26). Counsel excepted to the ruling of the court with respect to each question, *but made no offer of proof*. Appellee's position is that in the absence of an offer of proof, Appellants cannot complain of the court's ruling.

²Exhibit 1 and Exhibit "A" are on file in this court but not included in printed record.

2. Appellee was found to be an Hawaiian-born citizen by a Board of Special Inquiry which admitted him in 1923, and this action gave him *prima facie* status as a citizen. The refusal of the Immigration Service to issue him a "Certificate of Citizenship—Hawaiian Islands" on a showing he wished to travel abroad, authorized the District Court, under Title 8 U.S.C. 903, to enter a judgment that Appellee was a citizen of the United States, Appellants having offered no evidence to overcome Appellee's *prima facie* case made out by his own testimony and record of his 1923 hearing before the Board of Special Inquiry.

ARGUMENT.

Appellants present in this appeal that the trial court erred in sustaining objections to the following questions asked of Robert E. Lee, an Immigration Inspector, called as a witness for Appellants (R. p. 22):

1. "Q. Did you review the files of the Immigration Service to find out whether these witnesses had appeared in behalf of other applicants for admission to the United States?"

The objection to this question on the ground that it was incompetent, irrelevant and immaterial was sustained by the trial judge (R. p. 25).

2. "Q. (By Mr. Hoddick): Mr. Lee, showing you Certificate of Death No. A-502, dated December 6, 1948, covering the death of one Lai

Yung, which was previously shown to the plaintiff, I ask you if you have examined the records of the Immigration and Naturalization Service for the purpose of determining whether other applicants for admission to the United States have claimed that same death record."

This question was objected to on the same ground and was sustained (Tr. p. 26).

The court's rulings with respect to both questions were unquestionably correct. If counsel was dissatisfied with the rulings, it was his duty to make offers of proof and his failure to make any such offers leaves nothing for review. As said in *Patton v. Lewis*, 146 Fed. (2d) 544: "Where an objection to a question is sustained, an offer must be made disclosing the substance of proffered evidence, otherwise the ruling of the court is not reviewable."

"To secure a review of ruling excluding evidence, an offer of proof is essential so that the court may know the relevancy and materiality of such testimony."

McVeigh v. McGurren, 117 Fed. (2d) 672. Certiorari denied 61 Sup. Ct. 960, 313 U.S. 575.

In *New York Life v. Doerkson*, 75 Fed. (2d) 96 p. 101, the court said:

"Where an objection to an evidence is sustained in an action at law, the general rule is that the record must disclose the substance of proffered evidence before there can be a reversal because of the rejection."

See also:

Albrecht v. New Amsterdam Casualty Co., 163
Fed. (2d) p. 16;

Federal Surety Co. v. Standard Oil Co., 32 Fed.
(2d) 119;

Hatch v. U.S., 34 Fed. (2d) 436;

*Sacramento Suburban Fruit Lands Co. v. Mil-
ler*, 36 Fed. (2d) 922.

On the basis of the foregoing authorities, we submit the trial court's ruling on the two questions is not open to review.

If counsel wished to show that the witnesses who appeared for Appellee in 1923 had on different occasions testified in other cases in such a way as to bring criticism on them, obviously it could not have the legal effect of impeaching their 1923 testimony and it would have nothing to do with the weight of their testimony, as their evidence was positive and uncontradicted and left nothing to weigh it against (*Wong Kam Chong v. U.S.*, 111 Fed. (2d) 707 at 711).

It is surprising to note in Appellants' brief the statement that the court's ruling sustaining objection to the question deprived them of an opportunity to prove that Appellee's witnesses were "professional". This statement is without truth, is baseless and should not have been made. The objection was well taken, the evidence inadmissible, and regardless of counsel's personal opinion of the witnesses, who are not alive to defend themselves, the judge's ruling was manifestly correct. Also, if counsel wished to show that the 1902

death record of Yung Lai had been used by others in representing he was their father, evidence would have to be adduced that Appellee was not the child of Yung Lai and that his claim in that regard was spurious. Appellants made no pretense of offering any such proof. There is not a scintilla of evidence against the honesty and truthfulness of Young How Yee, Down Tong Chin and Hu Tiam, Appellee's 1923 witnesses, in their testimony in his case, or any evidence or suggestion of evidence that the 1902 death record of Yung Lai did not appertain to the father of Appellee.

It is contrary to the fundamental principles of due process that Appellee should be required to assume the obligation of vicarious responsibility for the acts of individuals in matters in which he has no knowledge, connection or interest, simply because twenty-seven years ago three of them appeared as witnesses and testified to his Hawaiian birth, or because certain unnamed Chinese in good faith or otherwise represented that the Yung Lai who died in 1902 was their father.

It is inconceivable that the ruling of the judge on the questions objected to could have been other than it was. This is a judicial proceeding and the court is restricted in the reception of evidence to only such evidence as meets the requirements of legal proof (*Lee Choy v. U.S.*, 9th Cir., 49 Fed. (2d) 24 at p. 27). In *Fong Lum Kwai v. U.S.*, 9th Cir., 49 Fed. (2d) 19 at p. 23, dealing with a somewhat similar situation (evidence was admitted to show that five Chinese had been admitted on the same death record), this court said:

“* * * evidence of such other decisions by the Board of Special Inquiry admitting other Chinese was objected to as incompetent, *and this objection should have been sustained.*”

This case is parallel in many respects to *Wong Kam Chong v. U.S.*, 111 Fed. (2d) (9th Cir.) 707. Said the court:

“The government offered no direct evidence that appellant was not born in Hawaii. It offered evidence to show that the birth certificate was not a record of appellant’s birth, and to show certain discrepancies, none of which affected the testimony of Chung Chong. Could the trial court lawfully disbelieve it? The hearing below was ‘judicial’. *Ng Fung Ho v. White*, 259 U.S. 276, 283, 42 S. Ct. 492, 66 L. Ed. 938 * * * No question as to the credibility of Chong Chung so far as his demeanor and actions in testifying, is present here, because only a written record of his testimony is presented. The evidence was not hearsay. There was no impeachment, or attempt to impeach, and no contrary evidence. The weight of the testimony is not involved, because it is not testimony from which we must infer the ultimate fact, but is evidence of the ultimate fact itself. It is, therefore, either true or false. The presumption is that the witness testified truthfully * * * In short, there is no evidence in the record, or other reason present, which would justify a disbelief of the witness. See 70 D.J. 760 Pr. 916 et seq. The uncontradicted evidence should, therefore, have been accepted. *Lau Hu Yuen v. United States*, 9th Cir., 85 Fed. (2) 327, 331.”

PRIMA FACIE CASE.

The position of counsel has been that the determination of Appellee's citizenship in 1923 by a Board of Special Inquiry and his admission into the United States do not create a prima facie case of citizenship in his favor. We respectfully submit, he is wholly in error in this regard. The case he cites and relies on, *Lum Mon Sing v. United States*, 124 Fed. (2d) 21, is not in point. It deals with the law applicable where a Chinese previously admitted departs from the United States. By departing he impliedly consents to a re-determination of his status when he seeks to re-enter, and the Immigration authorities, in passing on his right to re-enter, are not bound by their prior determination or by the ordinary rules of evidence in gathering facts to support their decision. *But where the citizenship of a Chinese resident here, whose citizenship has been favorably passed upon by a Board of Special Inquiry, is brought in question, it is now settled law that the administrative finding and determination creates in his favor a prima facie case, good against all attacks, until overcome by competent evidence, showing Appellee had gained his admission by fraud or is illegally present in the United States.*

Wong Kam Chong v. U.S., 9th Cir., 111 Fed. (2d) 707;

Choy Yuen Chan v. U.S., 9th Cir., 30 Fed. (2d) 516;

Leong Kwai Yin v. U.S., 9th Cir., 31 Fed. (2d) 738;

Lee Choy v. U.S., 9th Cir., 49 Fed. (2d) 24;

Fong Lum Kwai v. U.S., 9th Cir., 49 Fed. (2d) 19;

Lum Mon Shing v. U.S., 9th Cir., 29 Fed. (2d)
500;

Lau Hu Yuen v. U.S., 9th Cir., 85 Fed. (2d)
327.

OLD DEPARTURE RECORDS.

Counsel has made no point of the fact that the old manifest of the *SS Coptic* ex Honolulu June 3, 1902, does not show the names of Appellee and his mother. The Board which admitted Appellee noted that their names could not be found, but realized these old manifests are worthless as evidence. Names are omitted, some abbreviated, some misspelled; they are inaccurate and incomplete (R. p. 29) and have never been regarded as possessing any importance in determining departures from Honolulu around the turn of the century.

CONCLUSION.

The evidence of Appellee having established prima facie his Hawaiian birth and citizenship, and his evidence being in no wise contradicted or overcome, it is respectfully submitted that the judgment of the District Court should be sustained, and it is so moved.

Dated, Honolulu, Hawaii,
January 12, 1951.

Respectfully submitted,

E. J. BOTTS,

Attorney for Appellee.

No. 12689

United States
Court of Appeals
for the Ninth Circuit.

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 516)

PAUL P. O'BRIEN,

CLERK

Appeals from the United States District Court,
for the District of Oregon.

No. 12689

United States
Court of Appeals
for the Ninth Circuit.

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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WILLIAM H. VEEDER,
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Portland, Oregon,
Attorneys for Appellee.

In the District Court of the United States
for the District of Oregon

Civil Action File No. 3669

SHEFF WHITE, ORLAND WHITE and JOE M.
WHITE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the above named plaintiff and for
cause of action against the defendant alleges:

I.

That the acts and omissions herein complained of
happened and occurred within the State of Oregon
and the Judicial District above entitled, and this
action is brought against the defendant pursuant to
the provisions of the "Torts Claims Act," passed by
the Congress of the United States on August 2nd,
1946.

II.

That the plaintiffs are the owners of the lands
hereinafter described, and during the crop season of
1946 was entitled to the exclusive possession thereof
and of the crops, issues, emblements and profits
derived therefrom.

III.

That said lands are arid in character and require artificial irrigation for the production of crops; but, when irrigated, said lands produce large and abundant agricultural crops commonly grown in the vicinity of said land.

IV.

That for the purpose of securing an adequate supply of water for the irrigation of said lands, the owners thereof caused said lands to be included within the boundaries of the Owyhee Irrigation District hereinafter described; that said Owyhee Irrigation District is a quasi-municipal corporation, organized under the laws of the State of Oregon pertaining to irrigation districts, and that by reason of said lands being included within the boundaries of said district, and because of the provisions of the statutes of the State of Oregon, said lands were entitled to have delivered thereon such proportionate amount of the water stored and distributed by the defendant through said system as could be beneficially used on lands properly prepared for irrigation, which plaintiff alleges to be four acre feet of water during each irrigation season for the irrigation thereof.

V.

That all the taxes and charges of every nature which had been assessed against said lands were timely paid so as to entitle the plaintiff to have delivered to said lands the water which was appur-

tenant thereto because of said lands being within said irrigation district.

VI.

That heretofore, and during the year 1930 and prior thereto, the defendant United States of America, acting by and through the Department of the Interior and Bureau of Reclamation as agencies and departments of said defendant, caused to be constructed in the State of Oregon, the dams, tunnels, canals, headgates, spillways, laterals and all other means and methods for storing, impounding and distributing the waters of the Owyhee River for the purpose of irrigating lands in Oregon and Idaho, pursuant to and as authorized by the statutes enacted by the Congress of the United States, and the rules, regulations and orders of said Department of the Interior and Bureau of Reclamation aforesaid, and the officers agents, directors and employees of said agencies, which irrigation and storage works have been, by said defendant, designated, and shall be hereinafter referred to, as the Owyhee Project.

VII.

That heretofore and prior to the acts and omissions complained of, the defendant, acting through the Department of Interior and Bureau of Reclamation as the agencies and departments of said defendant, entered into a contract with said Owyhee Irrigation District for the storage, impounding and distribution of the waters appurtenant to the lands within

said district, and particularly the lands herein described.

That said contract was so made pursuant to Sec. 125-308 O. C. L. A. and of the Act of Congress of the United States of America, entitled "An Act to Promote Reclamation of Arid Lands," approved August 11, 1916.

VIII.

That in said contract, among other things, it is provided:

"Sec. 14: The District, together with other districts and/or organizations which enter into contract with the United States to secure water from the works of said Owyhee Project, and agree to pay a proportionate share of the costs of said project, shall, through and by means of the Board of Control provided for herein, at the expense of the districts and/or other organizations represented on the said Board of Control, and without expense to the United States operate and maintain the works described in Article 8 hereof, after the construction thereof by the United States and notice from the Secretary that said works or any part thereof must be taken over by the said parties and shall keep a capable person in charge thereof."

That said notice from the Secretary above mentioned was not given prior to July 12th, 1946, and has not been given by said Secretary prior to the commencement of this action.

IX.

That at all of the times herein mentioned the said defendant, United States of America, acting by and through the Department of the Interior and Bureau of Reclamation and the agents, officers and employees of said agencies of the defendant, United States of America, has, pursuant to the provisions of said contract with the Owyhee District, assumed and retained the exclusive operation and control of the dam, outlets, gates, canals, ditches, headgates and laterals of said Owyhee Irrigation project (situated in Oregon and Idaho, and known as the Owyhee Irrigation Project) and at all the times hereinafter mentioned, said defendant, United States, by and through said agencies, to-wit: the Department of the Interior, Bureau of Reclamation and the officers, directors, agents and employees of said agencies, were in active and exclusive control of all the works and means of storing, impounding and distributing the water of the Owyhee River by and through said Owyhee Project for the purpose of irrigation as aforesaid.

X.

That at all the times herein mentioned, said defendant had impounded in its dams, reservoirs and canals aforesaid, and under the control of said defendant, its agents and employees, ample and sufficient water to adequately irrigate all of the lands which said defendant was obligated to deliver water to, including the lands of this plaintiff herein described, and defendant's failure to so deliver water

to this plaintiff was on account of the negligent and wrongful acts and omissions of the agents and employees of the defendant while acting within the scope of their employment, and not otherwise.

XI.

That beginning on the 12th day of July, 1946, and for a period of approximately three weeks thereafter, the said defendant, its officers, agents and employees, while acting within the scope of their employment, negligently and wrongfully, and through the negligent and wrongful acts and omission of the employees of said defendant, failed and neglected to deliver to the lands of this plaintiff any water for the irrigation of said land during said period of time; and because thereof, plaintiff did not receive his proportionate share of the water available for distribution during the irrigation season of 1946, and did not receive an adequate amount to efficiently irrigate his said land.

XII.

That said defendant, its agents and employees, while acting within the scope of their authority, and in the management of said ditch and distribution of said water, were negligent and careless in the following particulars, which negligence was the direct and proximate cause of plaintiff's loss and damage, that is to say:

A. That the canal on said Owyhee Project which conveys water to the lands of the plaintiff, herein-

after described, was constructed over a porous type of soil, which permitted water to seep through the bottom and sides of said canal in a manner and to the extent that the stability of said canal was greatly endangered; and for a long time prior to the acts and omissions herein complained of, and particularly during the time between the months of February, 1945, and July, 1946, said canal, for the reasons aforesaid, was in danger of breaking, and thus preventing the flow of water for the irrigation of plaintiff's lands.

That the condition of said canal was well known to the officers and employees of the defendant, or by the exercise of reasonable care could have been ascertained and known to said agents and employees. That said defendant, its agents and employees, while acting within the scope of their employment, carelessly and negligently allowed and permitted said canal to remain in such dangerous condition, and carelessly and negligently failed to repair the same; and, as a direct and proximate result of said negligence, said canal broke on or about the 12th day of July, 1946, allowing the water to escape therefrom, and away from plaintiff's lands.

B. That said defendant, its agents and employees, while acting within the scope of their employment, were further negligent in the operation of said canal in the further following particulars:

That thereafter and following said break, the defendant, acting through its agents and employees and within the scope of their authority, attempted to repair the said break in said canal; but said

defendant, its agents and employees, while so acting in the scope of their employment in repairing said break and at a time before the sides of said canal were reconstructed, and without improving or sealing the sides and bottom of said canal in such a manner as to prevent further leakage or washing away, carelessly and negligently turned into said canal a large and excessive amount of water and thereby washed away a large portion of said canal in such manner and to such extent that said defendants were unable to deliver any water to the plaintiff for the irrigation of his said lands for a period of three weeks as herein complained of.

That the effect of turning water into said canal prior to the repair thereof was well known to said defendant, its agents and employees, while acting within the scope of their employment, or by the exercise of diligence could have been ascertained and known by said agents and employees.

XIII.

That all of plaintiff's lands, to which water has heretofore been applied for irrigation, are fertile, of good soil and favorably located for the growing of agricultural crops; and, had the defendant furnished the plaintiff the amount of water to which plaintiff was entitled to, said lands would have produced large and abundant agricultural crops.

XIV.

That said real property so farmed by the plaintiff and more particularly described in Exhibit A was

thoroughly plowed, cultivated and prepared for planting during the planting season of 1946; and the total acreage thereof, as set forth in said Exhibit A, was timely planted to the various crops described in said Exhibit A, and thereafter cultivated, irrigated and cared for in a good and husbandlike manner.

That thereafter, the plaintiff timely harvested all of the crops grown on said lands during the crop season, and saved all of said crops; and herein, in Exhibit A, plaintiff has set forth the total amount of such crop and emblements which were actually produced on said lands.

XV.

That plaintiff had no other source of water for the irrigation of said lands; and during the period of time between July 12, 1946, and August 5th, 1946, there was no rainfall in the vicinity of said lands, and for that period of time said lands were wholly without water for irrigation or moisture of any kind.

XVI.

That by reason, and as a direct and proximate result of the defendant's failure to furnish such water to the plaintiff for the period of time aforesaid, said lands became dry and arid and all of the crops which plaintiff had growing thereon, and which are more particularly hereinafter described, withered and failed to grow or mature, to the plaintiff's loss in the amounts hereinafter alleged.

XVII.

That attached hereto and marked "Exhibit A" is a statement describing the lands to which plaintiff was entitled to have water delivered, the kind of crop plaintiff had planted, the normal yield of said crops when adequately irrigated, the amount of crops actually produced, the cost of production, the actual production, the net value of the crops produced, and plaintiff's loss because of the failure of normal production caused by the defendant's failure to deliver water to plaintiff, and plaintiff's damages as a result thereof, which Exhibit is hereby referred to and by such reference made a part of this complaint.

Wherefore, plaintiff prays for judgment in the amount of such damages, to wit: the sum of \$4,000.00. together with plaintiff's costs and disbursements herein expended and taxable.

/s/ P. J. GALLAGHER,

Attorney for the Plaintiff.

Exhibit A

The description of plaintiff's land referred to in the foregoing complaint is:

West Half of the Southwest Quarter of Sec. 36. Twp. 18 S. R. 46 E. W. M. in Malheur County, Oregon.

The plaintiff had planted and growing on said lands the following:

30 acres of Ladino clover

20 acres of alfalfa hay

49 acres of beets

The normal yield of said crops if adequately irrigated and the reasonable market value thereof would be:

5400 lbs. of Ladino clover @ \$1.50 per lb.	\$ 8,100.00
60 tons of alfalfa hay @ \$18.00 per ton	1,080.00
980 tons of beets @ \$13.50 per ton	13,330.00

Total normal yield	\$22,510.00
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The reasonable cost of planting, cultivating, irrigating and harvesting of said crops was.....	6,809.00
---	----------

\$15,700.90

Because of the shortage of water for irrigation plaintiff produced only the following crops of the reasonable value of:

No Ladino clover (total loss).

40 tons of alfalfa hay @ \$18.00	\$ 720.00
--	-----------

813.4 tons of beets @ \$13.50	10,980.90
-------------------------------------	-----------

<u>\$11,700.90</u>	\$11,700.90
--------------------	-------------

Total net loss	\$ 4,000.00
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The plaintiff's loss because of shortage of water complained of and the reasonable market value of each crop was:

5400 lbs. of Ladino clover @ \$1.50 per lb.	\$ 8,100.00
20 tons of alfalfa hay @ \$18.00 per ton	360.00
166.6 tons of beets @ \$13.50 per ton	2,249.00

Total loss in amount and value.....	\$10,709.00
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Less cost of production	6,809.00
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<u>Plaintiff's damages</u>	<u>\$ 4,000.00</u>
----------------------------------	--------------------

Affidavit of service by mail attached.

[Endorsed]: Filed July 2, 1947.

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT, THE
UNITED STATES OF AMERICA, TO THE
COMPLAINT FILED IN THE ABOVE-
ENTITLED CASE

I.

First Defense

The complaint fails to state facts sufficient to constitute a cause of action against the defendant upon which relief can be granted.

II.

Second Defense

It is shown on the face of the complaint that the Court lacks jurisdiction to hear or entertain the complaint as laid under the Federal Tort Claims Act (28 U.S.C., 921 et seq.).

III.

Third Defense

It is shown on the face of the complaint that the alleged negligence for which the plaintiffs seek to recover involved acts on the part of the employees of the United States of America which were wholly discretionary in character and for which the United States has not consented to be sued under the provisions of the Federal Tort Claims Act (28 U.S.C., 921 et seq.) or otherwise.

IV.

Fourth Defense

The defendant denies each and every allegation in paragraph I of the complaint.

V.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph II of the complaint and therefore denies them.

VI.

The defendant denies each and every allegation in paragraph III of the complaint.

VII.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the averments in paragraph IV of the complaint respecting the action of plaintiffs to include the lands described in the complaint in the Owyhee Irrigation District and therefore denies them; the defendant admits that the Owyhee Irrigation District is a quasi-municipal corporation organized under the laws of the State of Oregon, denying, however, that the said defendant, the United States of America, had a duty by reason of the statutes of the State of Oregon or otherwise to deliver water to the plaintiff.

The defendant refers to paragraph I contained in its motion to make more definite and certain filed

September 24, 1947, requesting this Court to order the plaintiff to set forth the provisions of the statutes of the State of Oregon which it is averred in paragraph IV of the complaint entitle the lands of the plaintiff to a proportionate share of water stored or developed by the irrigation system of the Owyhee Irrigation Project, and reiterates that request to the Court.

VIII.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph V of the complaint and therefore denies them, referring however to paragraph II of its motion to make more definite and certain filed September 24, 1947, requesting this Court to order the plaintiff to state specifically the taxes and charges referred to in the aforesaid paragraph V of the complaint, and reiterates that request to the Court.

IX.

The defendant admits the construction of the Owyhee Irrigation Project as alleged in paragraph VI of the complaint but refers to the request contained in paragraph III of its motion to make more definite and certain filed September 24, 1947, requesting the Court to require the plaintiff to state specifically the statutes, rules and regulations and orders of the Department of the Interior and Bureau of Reclamation relied upon in the aforesaid paragraph VI of the complaint, and reiterates that request to the Court.

X.

The defendant admits that it entered into a contract with the Owyhee Irrigation District as alleged in paragraph VII of the complaint but refers to paragraph IV of its motion to make more definite and certain filed September 24, 1947, requesting this Court to order the plaintiff to set forth in its entirety the contract referred to in the aforesaid paragraph VII of the complaint, and reiterates that request to the Court.

XI.

The defendant admits that there is contained in its contract with the Owyhee Irrigation District the section 14 which is quoted in paragraph VIII of the complaint but refers to paragraph V of its motion to make more definite and certain filed September 24, 1947, requesting that the plaintiff be required to set forth in its entirety the contract referred to, and reiterates that request to the Court.

XII.

The defendant admits the allegations contained in paragraph IX of the complaint but refers to paragraph VI of its motion to make more definite and certain filed September 24, 1947, requesting the Court to order the plaintiff to set forth with particularity the contract and the provisions referred to in the aforesaid paragraph IX of the complaint, and reiterates that request to the Court.

XIII.

The defendant denies each and every allegation set forth in paragraph X of the complaint and refers to paragraph VII of its motion to make more definite and certain filed September 24, 1947, requesting this Court to order the plaintiff to set out with particularity the acts of negligence referred to in the aforesaid paragraph X and likewise to set forth in their entirety any and all contracts relied upon by plaintiff in that paragraph, and reiterates that request to the Court.

XIV.

The defendant denies each and every allegation set forth in paragraph XI of the complaint and refers to paragraph VII of its motion to make more definite and certain filed September 24, 1947, requesting this Court to order the plaintiff to set out with particularity the acts of negligence referred to in the aforesaid paragraph XI and likewise to set forth in their entirety any and all contracts relied upon by plaintiff in that paragraph, and reiterates that request to the Court.

XV.

The defendant denies each and every allegation contained in paragraph XII of the complaint and refers to paragraph VIII of the motion to make more definite and certain filed September 24, 1947, by the defendant requesting this Court to order the plaintiff to set forth specifically the duty the United

States owed to provide against the acts of negligence alleged by the plaintiff in the aforesaid paragraph XII of the complaint, and reiterates that request to the Court.

XVI.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph XIII of the complaint and therefore denies them.

XVII.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph XIV of the complaint and therefore denies them.

XVIII.

The defendant does not have knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph XV of the complaint and therefore denies them.

XIX.

The defendant denies each and every allegation contained in paragraph XVI of the complaint.

XX.

The defendant denies each and every allegation contained in paragraph XVII of the complaint.

XXI.

Fifth Defense

The defendant adopts and reiterates each and every averment contained in the Fourth Defense set forth in this answer and alleges that if the plaintiff in fact experienced the damages stated in the complaint filed in this action that those damages arose from hidden defects in the construction of the canal involved or in the soil over which that structure was built concerning which the defendant had no knowledge and against which it could not guard.

Wherefore, the defendant prays judgment that the complaint of the plaintiff be dismissed and that defendant recover its costs and disbursements herein incurred.

Dated at Portland, Oregon, October 20, 1947.

/s/ HENRY L. HESS,

United States Attorney,

Attorney for the Defendant.

Duly verified.

Certificate of Service by Mail attached.

[Endorsed]: Filed October 20, 1947.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

A pre-trial conference having been duly held on the 2d day of December, 1947, at Vale, Oregon, the plaintiffs appearing in person and by counsel,

Messrs. Gallagher and Gallagher; and the defendant appearing by its counsel, Henry L. Hess, United States District Attorney, Victor E. Harr, Assistant United States Attorney, Linus M. Fuller, Special Assistant to the United States Attorney, and W. H. Veeder, Attorney, Department of Justice; the following proceedings were had, to wit:

Agreed Facts

The following admissions were made between the parties through their respective counsel:

1. The lands involved in this case are described as follows: W $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. 36, T. 18 S., R. 46 E.W.M., and the irrigable area thereof is arid in character and is situated within the boundaries of the Owyhee Reclamation Project constructed by the defendant pursuant to the Federal Reclamation Laws, being the Act of June 17, 1902 (32 Stat. 388) as supplemented and amended.

2. The irrigable lands involved in this case are situated within the boundaries of the Owyhee Irrigation District, a quasi-municipal corporation, organized and existing pursuant to the laws of the State of Oregon.

3. The defendant and the Owyhee Irrigation District, a quasi-municipal corporation, entered into a contract dated October 14, 1926 (hereinafter referred to as the 1926 contract), which contract provided among other things, that irrigable lands within the district are entitled to delivery of the propor-

tionate share of water actually available under the Owyhee Reclamation Project each irrigation season but not more than required for beneficial use on the lands. The defendant, during the 1946 irrigation season, had water available to deliver a maximum of four acre feet per irrigable acre for the minimum charge.

4. It was covenanted and agreed by and between the defendant and the Owyhee Irrigation District in the 1926 contract, among other things, that the said Owyhee Irrigation District would indemnify and hold harmless the defendant against any and all costs arising from the construction, operation and maintenance of the irrigation system constructed by the defendant to reclaim and serve the irrigated acreage within the said Owyhee Irrigation District and that the provisions pursuant to which the said district so stipulated are set forth in part in Sections 17 and 44 respectively, as follows:

Computation of Costs

The cost of which under this contract the District obligates itself to pay a pro rata share, as determined by the Secretary, shall embrace all expenditures of whatsoever kind, in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal work, superintendence, administration and overhead, right of way, property and damage of all kinds, and shall include all sums expended by the United States in surveys and investigations in connection with the irrigation of the

project lands, both prior to and after the execution of this contract, and the expense of all soil investigations and other preliminary work and land appraisal provided for in Articles 41 and 42 hereof, and shall also include the expense incurred by the United States in operating or maintaining any of said works prior to the taking over of the operation and maintenance thereof by the said Board of Control provided for herein as the operating agent of this District and the other districts which may by contract with the United States become entitled to receive water from said works.

Shortage of Water

On account of drought, inaccuracy in distribution, or other causes, there may occur at times a shortage in the water supply for lands of the District, and while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States, its officers, agents or employees for any damage, direct or indirect, arising therefrom, nor shall any obligation provided for herein be reduced because of any such shortage or damage.

5. The said 1926 contract likewise provided that every landowner within the Owyhee Irrigation District would be considered to have consented to the provisions of the aforesaid contract and to have been bound by the terms and conditions thereof, if he did not object to the confirmation of the contract by the Court having jurisdiction thereof or the proceedings authorizing the same, or if he received and

used water made available through the irrigation works of the Owyhee Project, as provided in Section 32 of said contract, as follows:

Accepting benefits waives objection

Every landowner of the District who offers no objection to the confirmation of this contract by the court, or the proceedings authorizing the same, or who accepts the benefits thereof by receiving or using water made available through the works constructed by the United States, thereby consents to all the provisions of this contract and waives any objection thereto.

6. The plaintiff, Sheff White, entered into a contract with the Owyhee Irrigation District dated December 29, 1941, ratifying, confirming and consenting to the terms of the 1926 contract between the defendant and the Owyhee Irrigation District, binding himself, his heirs, successors and assigns and so binding the irrigable lands described and involved herein, to all the terms and conditions of the 1926 contract.

7. A decree was duly made and entered in the Court having jurisdiction thereof, validating the proceedings relative to the organization of said Owyhee Irrigation District and confirming all of the terms and conditions of the 1926 contract entered into by and between said district and the defendant.

8. Neither the plaintiffs or their predecessors in interest objected to the confirmation of said 1926 contract between the defendant and the Owyhee

Irrigation District or the proceedings authorizing the same at the time of the confirmation of the contract by the Court nor at any time, but to the contrary, the plaintiffs and/or their predecessors in interest have utilized irrigation water and have accepted the benefits which have been provided pursuant to the 1926 contract and have enjoyed all of the benefits available under said contract.

9. Decrees were duly entered by courts of competent jurisdiction, confirming contracts between the defendant and the following districts:

Gem Irrigation

District.....Dated October 14, 1926

Ontario-Nyssa Irrigation

DistrictDated February 5, 1927

Payette-Oregon Slope Irrigation

DistrictDated October 14, 1926

Crystal Irrigation

DistrictDated November 28, 1931

Bench Irrigation

DistrictDated October 5, 1931

Slide Irrigation

DistrictDated October 14, 1926

Advancement Irrigation

DistrictDated September 1, 1936

Each of the contracts between the defendant and the above-named irrigation districts contains provisions similar in substance to those contained in

the contract of 1926 between the defendant and the Owyhee Irrigation District and each contains paragraphs identical in substance with Paragraph 17, 44 and 32 set forth above.

10. During all of 1946, the defendant was in control of and operating the Owyhee Reclamation Project, including the north canal of the Owyhee Project, which canal is approximately 70 miles long. A break occurred in the north canal on Sunday, July 14, 1946, at a point approximately 36.15 miles from the head of the canal and near the west line of and in Sec. 1, T. 19 S., R. 46 E., W.M. The break was approximately 50 feet wide at its widest point. The water in the canal, which could not be diverted from the canal above and below the break, drained out of the canal through the break, and repair work was commenced. On Thursday, July 18, 1946, repairs had progressed to a point where the engineer in charge of the repair work ordered water turned into the canal, which was done. A second break occurred at approximately 1:30 a.m., July 19, 1946, downstream from the first break. The canal was repaired and being operated under full capacity on the 31st day of July, 1946.

11. Plaintiffs make claim for damage in this proceeding in the sum of \$4000.00 for failure to deliver water to the lands hereinbefore described.

12. The water assessment levied by the Owyhee Irrigation District against the irrigable lands described herein was paid by plaintiffs prior to July 14, 1946.

13. That the seven irrigation districts named in paragraph 9 above and the Owyhee Irrigation District comprise all the irrigation districts forming the Owyhee Reclamation Project.

Plaintiffs' Contentions

Plaintiffs contend:

1. That by reason of their irrigable lands being within the boundaries of the irrigation district, and the payment of charges assessed, they were entitled to have water delivered to their irrigable lands in quantities and at intervals that would reasonably insure an adequate supply of water for the irrigation of their crops.

2. That because the defendant retained the management and control of the water serving facilities of its project by its contract with the Owyhee Irrigation District, it was the duty of the defendant to furnish this water to the plaintiffs.

3. That the failure to furnish available water for the period shown by the record, or approximately three weeks, under surrounding circumstances and conditions, amounted to a violation of that duty and such failure to deliver water was the direct and proximate cause of plaintiffs' damage.

4. That the defendant recognized the plaintiffs (and other landowners) as the real parties in interest in its contract with the Irrigation District of which plaintiffs' land were a constituent part, and that such contract was in fact made for the use and benefit of the plaintiffs (and other landowners).

5. That because of requiring the Irrigation District to collect water service charges from the plaintiffs, and forbidding the delivery of water to the landowners in default of such payments, the defendant has made the plaintiffs indispensable parties to the performance of the contract with the Irrigation District.

6. When the defendant required the confirmation of the contract by an affirmative vote of a majority of the landowners within the irrigation District, it in fact was contracting with the respective landowners.

7. The duty to deliver water was a duty owed the plaintiffs and not a duty owed to the Irrigation District as a separate entity.

8. That when the plaintiffs paid their water charges to the defendant or to the irrigation district for the defendant, they then became parties to the contract and entitled to the benefits of performance.

9. Upon accepting the annual charge for delivery of water for the respective year, a relationship was created between the defendant and the plaintiffs, a violation of which would entitle the plaintiffs to pursue a claim for injury because of a violation of such duty.

10. The Federal Tort Claims Act (28 U.S.C. 931) affords a remedy "on account of damages to or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable

to the claimant for such damages * * * in accordance with the law of the place where the act or omission occurred.”

It is immaterial to the prosecution of a claim for injuries against the defendant whether the claim was founded on a contract, or based upon a tort as understood by common law. It is likewise immaterial to the right to recover that the relationship between the plaintiffs and defendant be one of contract or trespass.

The fact that plaintiffs have referred to the “Torts Claims Act” in the jurisdictional allegation of their pleading, merely refers to the popular name of the Act as indicated by Congress, and is not an indication that the claim must be based either on a tort or a contract.

11. Plaintiffs are entitled to prove a contractual relationship as a basis of defendant’s duty, and plaintiffs’ right of recovery for a violation of such duty, and by so doing they do not make an election to proceed under any other or different federal statute.

12. So long as the facts relied upon justify relief under the provision of the Act of Congress of August 2, 1946, (Sec. 931, Title 28, U.S.C.A.) plaintiffs should not be put to an election between this and some other, or different, act.

13. It is not necessary that plaintiffs prove the elements of a “tort,”—if they establish that the act complained of was negligent or the acts or omissions were wrongful, they are entitled to relief.

14. If the facts as developed indicate the plaintiffs' claims are founded upon a contractual relationship and not because of negligence or a wrongful act or omission of an employee of defendant, then plaintiffs would be entitled to relief under the Act of Congress popularly known as the Tucker Act, and relief can be granted in accordance with the terms of that act.

15. It is our contention that Sec. 931, Title 28, U.S.C.A. makes the United States liable in all cases where an individual would be liable and this liability is to be determined by the law of Oregon, and in this state, in the event of a wrong arising out of a contractual relationship, the injured party can waive the contract and sue in tort.

16. It is immaterial whether the action be considered as one of contract or of tort. The negligent or wrongful failure to deliver the proportionate share of water to which the plaintiffs were entitled is the gist of the claim.

17. It is plaintiffs' contention that if there be a duty on defendant to furnish water to plaintiffs that defendant has no discretion as to whether or not it will respond to that duty. The defendant having entered upon the performance of that duty by delivering water or by the operation of the distributing system, it has no discretion to perform that duty in a negligent manner, or to avoid the reasonable performance of that duty by its wrongful act or omission.

If the defendant had the right to deliver or not to deliver water, a discretion might be exercised. If the discretion was wrongfully exercised, an actionable wrong would ensue. Having exercised the discretion, if one existed, and in the act of delivering water, some act or thing was to be done by defendant, it would be under the duty of performing that act or thing in a reasonable and prudent manner.

18. It is plaintiffs' contention that the contracts having established, and it being admitted by the defendant, that plaintiffs' land described herein being entitled to receive water for the irrigation of said land, and the defendant having water available for delivery, the failure of the defendant to deliver would be an actionable wrong for which plaintiffs would be entitled to recover under the Tort Claims Act.

19. Plaintiffs further contend that hidden defects in the soil in which the structure was built is not a defense available to the defendant.

20. Plaintiffs contend that they had planted the following crops on the following number of acres, to wit: 30 acres of land in clover, 20 acres of alfalfa and 49 acres of sugar beets; that all of said lands were irrigable and entitled to receive the proportionate share of water available therefor in the Owyhee Project; that had said lands received such proportionate share of water, there would have been produced on said lands 5,400 lbs. of ladino clover, 60 tons of alfalfa hay and 980 tons of sugar beets, of a gross value of \$8,100.00 for ladino clover seed,

\$1080.00 for hay and \$13,330.00 for sugar beets; that because of the water shortage caused by the breaks in defendant's ditch, there was actually produced only the following crop: No ladino clover seed, 60 tons of hay of the total value of \$720, and 813.4 tons of beets of the value of \$10,980.90; and that after deducting the sum of \$6,809.00 for the cost of production, plaintiffs' net loss because of defendant's failure to deliver water is the sum of \$4,000.00.

21. Plaintiffs contend that defendant's negligence is not imputable to any of the irrigation districts having contracts with the defendant under the Owyhee Project.

22. Plaintiffs contend that there is nothing in any of the contracts between the defendant and any of the irrigation districts contracting with the United States under the Owyhee Project which would exempt the defendant from liability for its negligent or wrongful act or omission, or that would justify the defendant in seeking indemnity from the result of such negligent or wrongful act or omission from the Owyhee District or any other district contracting with the defendant under the Owyhee Project.

23. Plaintiffs contend that the provisions of any contract attempting to exempt from or indemnify against future negligence of the defendant are illegal and void.

24. Plaintiffs contend that the provisions of any contract attempting to exempt from or indemnify

against future negligence of the defendant would be against public policy and therefore void.

25. Plaintiffs contend that contracts exempting from liability for negligence are not favored by law. They are to be strictly construed against the party relying on them, and clear and explicit language in the contract is required to absolve such person from liability.

26. Plaintiffs contend that in the construction, management and operation of the Owyhee Project the defendant was acting in a proprietary capacity, and not in a governmental capacity.

27. Plaintiffs contend that it is not within the power or authority of an irrigation district organized under the laws of the State of Oregon to contract with the defendant to exempt the defendant from its negligence or to indemnify the defendant from the result of such negligence, and that such a contract would not bind the plaintiffs.

28. Plaintiffs contend that because of the two breaks occurred so closely together in point of time and location that the resulting damage occurring therefrom could not be distinguished as to each break.

Defendant's Contentions

1. The United States of America, in determining the course, elevation and location of the canal and the manner and extent of lining or other treatment of the foundation or soil over which the canal was constructed, was exercising a strictly discretionary

governmental function of the highest character which is specifically exempt under the provisions of the Federal Tort Claims Act (28 U.S.C. 943 (a)).

2. In the selection of the plan of construction of the north canal in which the break occurred, the United States was exercising a strictly discretionary governmental function of the highest character.

3. The United States, in constructing the Owyhee Reclamation Project, was exercising its constitutional authority to reclaim its arid lands, thus making them habitable.

4. In making its determination respecting the location, type of construction, course and elevation of the canal, the United States was guided by the consideration of the greatest number of acres which it could reclaim for occupancy at the lowest cost per acre and within the contractual limit of expenditures for construction provided by the 1926 contract with the Owyhee Irrigation District.

5. In operating and maintaining the canal, the United States was likewise exercising the highest type of discretion.

6. The methods used in repairing each of the breaks in the north canal and the material utilized in accomplishing that repair were matters of engineering judgment involving the highest type of discretion. Similarly, the quantity of water and the manner of introducing a flow of water into the canal after the first break had been repaired were matters of engineering judgment involving discretion of the highest character.

7. The second break was not caused in any respect by the first break or the operations in connection with the repair thereof. That the second break, although similar in nature and cause, was separate and distinct, and entirely independent of the first break.

8. Immediately after each break in the north canal, the defendant initiated the repair thereof, taking all reasonable precautions to limit the damages which might arise therefrom and to expeditiously return the canal to normal operating conditions.

9. The United States, in selecting the course of the canal, had no alternative but to construct it over the type of soil upon which it is located because the area in question is all substantially alike. Thus, the United States had to exercise its discretion as to whether it should construct the canal over the character of soil on which it was constructed or to refrain from constructing it entirely.

10. In determining to line only a portion of the canal, the United States was exercising discretion of the highest character. In its judgment not to line the entire canal the United States determined as a matter of good engineering judgment that such lining was neither requisite nor necessarily desirable and to line a 70 mile canal would result in such an exorbitant cost that the said project would not have been feasible.

11. The breaks in the canal resulted from the formation of earth strata beneath the floor of the canal constituting a latent defect concerning which the United States or its officers and agents had no knowledge prior to the time of the break in the canal and against which they could not guard.

12. The United States was not negligent in the construction, operation and maintenance of the north canal and that at all times that canal was kept in a state of good repair.

13. For a period of approximately 11 years the canal at the point of the breaks had carried a full capacity of water during irrigation seasons and at no time gave evidence of weakness that would probably result in a break or breaks.

14. At all times, in accordance with good practice of operation and maintenance, the United States employed a competent ditch rider who regularly inspected the ditch, including the area where the breaks occurred, and the ditch rider on the day when the first break occurred had inspected the area in question and observed nothing indicating a weakness in the canal which would give any knowledge that a break would take place.

15. The burden of proof is on the plaintiffs to establish a duty on the part of the defendant to protect them against the negligence claimed; the alleged acts of the negligence; that the negligence, if any, was the proximate cause of the damage alleged, and the nature and extent of the damage claimed.

16. There is no duty on the part of the defendant owing to the plaintiffs to protect them from the alleged negligence or from the damages alleged in their claim.

17. There was no privity of contract between the plaintiffs and the defendant as to the delivery of water nor is there any other basis from which a duty owing to the plaintiffs could arise in connection with the construction, operation and maintenance of the north canal.

18. Defendant has in no respect breached its contract of October 14, 1926.

19. Negligence on the part of the defendant was not the proximate cause of the loss or damage which is the basis of plaintiffs' claim.

20. If there was a duty owing by the United States in connection with the operation and maintenance of the north canal, it was to the Owyhee Irrigation District and not to the plaintiffs.

21. The plaintiffs are bound by all the provisions of the contract of October 14, 1926, including in particular Sections 17, 44, and 32 thereof by reason of the execution by them or their predecessors in title of the so-called short form of recordable contract in which are incorporated by reference the terms of the long form of recordable contract entered into between the Owyhee Irrigation District and J. J. Sarazin and his wife dated the 25th day of March, 1927, and by reason of their failure to offer any objections to the proceedings authorizing

the making of such contract of 1926 and its confirmation, and by reason of receiving and using, without objection, water made available under that contract.

22. The irrigation districts having contracts pursuant to which they agreed to pay to the United States all of the costs of constructing, operating and maintaining the Owyhee Reclamation Project, namely, the Gem, Owyhee, Ontario-Nyssa, Payette-Oregon Slope, Crystal, Bench, Slide and Advancement Irrigation Districts should be made third-party defendants in this case pursuant to the motion of the defendant of December 2, 1947.

23. That each and all of the claimed acts of negligence, if any, on the part of the defendant were based upon the exercise or performance or the failure to exercise or perform discretionary functions or duties on the part of a Federal Agency or employees for the Government for which the Government is exempt from damage for any cause.

24. In the operation of the Owyhee Project, including the north canal, the defendant is not an insurer and does not insure against damages caused by failure to deliver water.

25. The 1926 contract executed by the Owyhee Irrigation District and ratified and confirmed by plaintiffs, waived any and all claims for damages against the United States, including those emanating from the failure to deliver water; and the District and these plaintiffs are by such contract obligated to indemnify and hold harmless the

United States from any and all damages claimed to arise from failure to deliver, including the claims of the plaintiffs.

26. The rights, if any, of the plaintiffs to the delivery of water are subject to each plaintiff establishing that he or she did not, as owners, receive water from the project supply for more than 160 acres of irrigable land within the Owyhee Project or any other Federal Reclamation Project established pursuant to the Federal Reclamation Laws.

Disputed Facts

1. Whether the acres of land set forth in plaintiffs' claim were irrigable and entitled to water from the works of the Owyhee Project during the irrigation season of 1946.

2. Whether the plaintiffs were the owners of the lands described herein, and the respective interest that any of the plaintiffs may have in said lands or in the crops grown thereon for the year 1946.

3. Whether there are any persons or person other than the plaintiffs entitled to or who have a right to participate in the proceeds from the sale of the crops allegedly damaged by the failure of the defendant to supply water.

4. Whether the plaintiffs had planted 30 acres of irrigable land with ladino clover; whether those lands were entitled to be irrigated from the water supplied by the defendant to the Owyhee Irrigation District; what was the amount, nature and extent

of the damage to said crop, if any, as a result of the breaks in the canal.

5. Whether the plaintiffs had planted 20 acres of irrigable land with alfalfa hay; whether those lands were entitled to be irrigated from the water supplied by the defendant to the Owyhee Irrigation District; the amount, nature and extent of the damage to said crop, if any, as a result of the breaks in the canal.

6. Whether the plaintiffs had planted 49 acres of irrigable land with beets; whether those lands were entitled to be irrigated from the water supplied by the defendant to the Owyhee Irrigation District; the amount, nature and extent of the damage to said crop, if any, as a result of the breaks in the canal.

7. Whether the breaks in the canal were the proximate cause of the damages claimed.

8. Whether the defendant was in fact negligent as asserted by the plaintiffs in their claimed particulars as follows, to wit:

(a) That there was a defect in the plan of constructing of said canal in that the same was constructed over and with a porous type of soil which permitted water to seep through the bottom and sides of said canal in a manner and to the extent that the stability of the canal was endangered.

(b) That for more than six months, in the maintaining of said canal, water had negligently been allowed to seep through the sides and bottom of

said canal and for such a length of time as to put the defendant on notice and knowledge as to the weakened condition of said canal.

(c) That the defendant negligently allowed and permitted said canal to remain in a dangerous or weakened condition and negligently failed to repair the same.

(d) That the defendant was negligent in the materials used in repairing the first break in the canal, and in not improving and sealing the sides and bottom of said canal in such a manner as to prevent leakage or washing away.

(e) That the defendant was negligent in turning into said canal a large and excessive amount of water after the repair work on the first break.

9. Whether any, each and all of the specified acts of negligence on the part of the defendant, if any, were the proximate cause of the breaks in said canal on July 14, 1946, and July 19, 1946, and if so, which specified act or acts.

10. Whether the canal broke on July 14, 1946, and July 19, 1946, as a result of the latent defects of earth formation and strata underneath the floor of the canal, and whether or not such latent defects were the proximate cause of the breaks in said canal and the failure of the defendant, if any, to deliver water to the plaintiffs as claimed.

11. Whether any, each or all of the specified acts of negligence, as set forth herein, were the proximate cause of the damage as claimed by plaintiffs, and if so, which specified act or acts.

12. Whether during the period July 14, 1946, to July 31, 1946, inclusive, the plaintiffs had any other source of artificial or natural water supply for the irrigation of or supplying adequate moisture to the said lands and the crops growing thereon.

12-A. Is any part of the plaintiffs' claim barred by the statute of limitations and if so what?

13. Whether, when irrigated, the lands are fertile and fruitful and produce abundant crops of all types commonly grown in the vicinity and that irrigation is necessary each year from early in April to late in the fall, and particularly during the hot months of July and August.

14. Whether for a period of approximately five weeks there was an increase in the seepage at the points where the two breaks occurred and whether at a time approximately three weeks prior to the breaks the defendant was notified of that fact.

15. Whether the first break disclosed latent or known defects below the bottom of that portion of the north canal where the second break occurred and whether it would have been negligent under the circumstances, if known to the defendant, to have failed to correct such latent defects.

16. Whether the plaintiffs, in view of the limit provided by the Federal Reclamation Laws and the 1926 contract as to the irrigable area to which water can be delivered, (160 acres owned by one person) are entitled to the delivery of water for all or any of the lands described in their complaint."

Exhibits

Exhibits were marked as pre-trial exhibits and reservations allowed for exhibits as listed below:

Plaintiffs. Description.

- 1—Contract between the United States of America and the Owyhee Irrigation District, dated October 14, 1926, and supplemental contract of March 16, 1936, having application to all irrigation districts in Owyhee Project.
- 2—Contract between the United States of America and Ontario-Nyssa Irrigation District, dated February 5, 1927.
- 3—Contract, J. J. Sarazin and wife with Owyhee Irrigation District, dated March 25, 1927.
- 4—Certificate of Secretary Frank T. Morgan, Owyhee Irrigation District, showing payment of assessment for 1946 on plaintiffs' land.
- 5—Certificate of Thomas Jones, Secretary of Ontario-Nyssa Irrigation District as to payment of assessments on lands not involved in this case.
- 6—Decree of confirmation by Circuit Court, State of Oregon for Malheur County, confirming organization of Owyhee Irrigation District and confirming proceedings for execution of the contract between the United States and Owyhee Irrigation District, dated August 12, 1926.
- 7—Findings of Fact and Conclusions of Law and Decree of the Circuit Court for the State of

Oregon for Malheur County, confirming the proceedings in organization of the Ontario-Nyssa Irrigation District and confirming the proceedings relative to the Contract between such District and the United States.

- 8—Pertains to Civil No. 3871.
- 9—Pertains to Civil No. 3871.
- 10—Pertains to Civil No. 3871.
- 11—Pertains to Civil No. 3871.
- 12—Pertains to Civil No. 3871.
- 13—Deed dated October 18, 1941, between P. C. Patterson and George G. Patterson, his wife, and Sheff White.
- 14—Contract between Sheff White and Owyhee Irrigation District dated December 29, 1941.
- 15—Pertains to Civil No. 3871.
- 16—Receipt. Pertains to Civil No. 3871.
- 17—Photograph.
- 18—Photograph.
- 19—Photograph.
- 20—Photograph.
- 21—
- 22—
- 23—
- 24—

25—

26—

27—Photograph.

28—Photograph.

29—Photograph.

30—Photograph.

31—Reserved for map. (No map.)

32—Pertains to Civil No. 3871.

33—Reserved for aerial map. (No map.)

Defendant's. Description.

34—Photostatic copy of Finding of Feasibility of Secretary of Interior, approved October 12, 1926.

35—Owyhee Irrigation Project map No. 23300A.

36—Photostatic copy of Contract between Gem Irrigation District and the United States of America, dated October 14, 1926.

37—Photostatic copy of Contract between Payette-Oregon Slope Irrigation District and the United States of America, dated October 14, 1926.

38—Photostatic copy of Contract between Crystal Irrigation District and the United States of America, dated November 28, 1931.

39—Photostatic copy of contract between Advancement Irrigation District and the United States of America, dated September 1, 1936.

- 40—Photostatic copy of Contract between Bench Irrigation District and the United States of America, dated October 5, 1931.
- 41—Photostatic copy of Contract between Slide Irrigation District and the United States of America, dated October 14, 1926.
- 42—Photograph, identification Reg. 1-1181.
- 43—Photograph, identification Reg. 1-1186.
- 44—Photograph, identification Reg. 1-1184.
- 45—Photograph, identification Reg. 1-1183.
- 46—Photograph, identification Reg. 1-1185.
- 47—Reserved for photograph of canal showing canal after break. (Out.)
- 48—Reserved for photograph of canal showing canal after break. (Out.)
- 49—Reserved for photograph of canal showing canal after break. (Out.)
- 50—Reserved for photograph of canal showing canal after break. (Out.)
- 51—Reserved for photograph of canal showing canal after break. (Out.)
- 52—Reserved for photograph of canal showing canal after break. (Out.)
- 53—Reserved for model of portion of canal at break.
- 54—Reserved for all documentary proofs relating to crop damages.

Plaintiff's. Description.

55—Reserved for all documentary evidence relating to titles, chattel mortgages, leases, etc., and memorandum of sale of various crops, etc.

56—Pertains to 3871.

Defendant's. Description.

57—Reserved to defendant's contrary proof pertaining to 55.

58—Pertains to 3871.

59—Reserved for Certificate of Secretary of Owyhee Irrigation District, as to number of irrigable acres of plaintiffs' land entitled to water. (Out.)

60—Notice of Availability issued by Secretary of Interior for:

- (a) Owyhee Irrigation District.
- (b) Advancement Irrigation District.
- (c) Bench Irrigation District.
- (d) Crystal Irrigation District.
- (e) Gem Irrigation District.
- (f) Ontario-Nyssa Irrigation District.
- (g) Payette-Oregon Slope Irrigation District.
- (h) Slide Irrigation District.

Plaintiffs'. Description.

61—Certified copy of the application to the State Engineer of the State of Oregon by the United States of America to appropriate waters of the Owyhee River.

- 62—Certified copy of certificate of appropriation issued by the State Engineer of the State of Oregon to the United States of America.
- 63—Contract for the construction of the north canal between the Bureau of Reclamation and J. A. Terteling, dated November 10, 1933, with the right to make certain references to parts of the contract which the parties may deem to be pertinent and material.
- 64—Reserved for the introduction of gauge readings regarding the flow of water in the north canal in the immediate vicinity of the break for the year 1946 prior to the time of the break. (Out.)
- 65—Field notes of witnesses called by either party used for reference.

Defendants'. Description.

- 66—(a) Patrolman's Reports. Report of daily readings of gauge heights for the gauge at Mile Post 36.7 on the North Canal. Reports are made weekly and cover the irrigation seasons for the years 1942, 1943, 1944, 1945 and 1946.
- (b) Graph showing daily gauge. Height readings for the Mile Post 36.7 gauge.
- (c) Geological Survey rating table for the gauge at Mile Post 36.7 (Table dated 2/6/42).
- (d) Graph showing daily discharge in cubic feet per second, years 1942 through 1946.

Plaintiffs'. Description.

- 68—Photograph.

69—Photograph.

70—Photograph.

71—Photograph.

72—Photograph.

73—Photograph.

74—Photograph.

75—Photograph.

76—Photograph.

77—Photograph.

78—Photograph.

79—Photograph.

80—Profile map.

81—Profile map.

82—Profile map.

Defendant objects to plaintiffs' Exhibits numbered 4 and 5 as not being competent on the question of ownership of property.

Defendant objects to competency and materiality of plaintiffs' photographic Exhibit number 27 and to the aerial map reserved number 33 and to map reserved as Exhibit number 31.

Defendant objects to plaintiffs' Exhibit 61 and Exhibit 62 on the grounds that they are irrelevant and immaterial.

Defendant objects to plaintiffs' Exhibits 68 to 79, inclusive, photographs taken year 1948, as being too

remote as they do not disclose condition of canal at time of breaks.

Defendant objects to plaintiffs' Exhibits 80, 81, and 82, profile maps, as they do not show real condition of the canal and are irrelevant and immaterial.

Plaintiffs withdraw from the pre-trial Exhibits, designated numbers 21, 22, 23, 24, 25 and 26.

The plaintiffs object to the introduction of the defendant's Exhibits marked 34, 36, 37, 38, 39, 40 and 41, as shown on the pre-trial order, upon the ground that each of said Exhibits are incompetent, irrelevant and immaterial and not pertaining to prove any issue on trial herein and that the matters therein contained are not binding on these plaintiffs and involves parties who are not now parties to this trial.

Any further identification of Exhibits not hereinbefore objected to are waived and all objections of Exhibits not objected to herein are waived.

Questions of Law

1. Whether this Court has jurisdiction under the Federal Tort Claims Act (28 U.S.C., 921, et seq.) of plaintiffs' claim.

2. Whether this Court has jurisdiction of plaintiffs' claim under the so-called Tucker Act (28 U.S.C., 250 et seq.; 28 U.S.C., 41, subsec. 20).

3. Whether the facts in this case are sufficient to constitute a claim against the defendant under the Federal Tort Claims Act.

3-A. Has the statute of limitations run against any portion or all of plaintiffs' claim and, if so, what portion?

3-B. Whether the defendant is liable under the Federal Tort Claims Act for any of the specific acts of negligence alleged by the plaintiffs which took place prior to January 1, 1945.

4. Whether the facts in this case are sufficient to constitute a claim against the defendant under the so-called Tucker Act (28 U.S.C., 250, et seq.; 28 U.S.C. 41, subsec. 20).

5. Whether there is a legal duty owing to the plaintiffs by the defendant by reason of its contract dated October 14, 1926, with the Owyhee Irrigation District, and the contract between the landowners and the District, and if so, what is the character of that duty.

6. Whether the Contracts impose a duty upon the defendant to the plaintiffs to protect them against their specified acts of negligence by reason of the facts established in this case.

7. Which of the parties, assuming that there is a legal duty on the part of the defendant owing to the plaintiffs to protect them against the specified acts of negligence, has the burden of proof.

8. Whether the acts of negligence which may be established in this case are of such character as to exempt the defendant from liability by reason of the provisions of 28 U.S.C., 943(a).

9. If any of the acts of negligence which may be established in this case against the defendant come within the purview of the exemption set forth in 28 U.S.C. 943(a), which act or acts come within that exemption.

10. Whether the irrigable lands described in plaintiffs' claim, being situated within the boundaries of the Owyhee Irrigation District, were entitled during the irrigation season of 1946 to have water delivered to them for the irrigation of the crops allegedly growing on those lands.

11. All water assessments for the irrigation season of 1946 having been paid, were the plaintiffs entitled to have water delivered to the irrigable lands described herein.

12. Whether the rights of the plaintiffs are derivative from the contract of October 14, 1926, and from the contracts which the landowners entered into with the Irrigation District; and, if so, whether the clause of the contract providing that no liability will accrue against the United States for any damages because of the shortage of water exempts the United States from liability to the plaintiffs assuming that evidence is adduced supporting the claim giving rise to this action, and whether the provisions of those contracts to indemnify the defendant and hold it harmless, exonerate it from liability by reason of the provisions of the contract of October 14, 1926, particularly the provisions of Sections 17, 44 and 32.

13. Whether the defendant is liable under the Federal Tort Claims Act for any of the specified acts of negligence alleged by the plaintiffs which took place prior to January 1, 1945.

14. Whether the payment of the water assessments for the 1946 irrigation season by the plaintiff to the Owyhee Irrigation District created a relationship with the defendant of an implied contract which entitled the plaintiffs to receive water for the irrigation season of 1946.

15. In the construction, operation and maintenance of the Owyhee Project, including the north canal and including the repairs thereof and the regulation of the flow of water therein, was the defendant at all times performing its governmental function or was it acting in a proprietary capacity?

16. Whether the defendant in the operation of the Owyhee Project, including the north canal, is an insurer against damages caused by failure to deliver water.

Additional Statement and Objections

The Court has denied for the present the Motion of the defendant to bring in all the irrigation districts referred to herein as third-party defendants, to which the defendant has made objections. If the Court eventually determines that those irrigation districts should be brought in as third-party defendants, the appropriate pleading will be filed and thereafter a pre-trial conference will be held

at which the irrigation districts will have an opportunity to appear and present their contentions and a supplemental pre-trial order will be entered.

It is agreed that the plaintiffs may tender evidence upon the trial to show the extent of the interest of each party plaintiff named herein in the lands involved and the crop grown thereon, and that defendant may tender evidence to controvert the same.

If the Court desires, it may segregate and try separately the issue of the liability of the defendant under any theory; and if found liable, it may try separately the question of damages, and in that event, if the Court shall so segregate the issues, thereafter a supplemental pre-trial order will be drawn covering questions of damages. However, if the Court does not segregate and try separately the issues involving the question of the defendant's liability and the question of damages, the defendant reserves the right to submit as exhibits adverse party depositions and/or interrogatories as to the amount, nature and extent of plaintiffs' claimed damages under this pre-trial order.

The Court at the pre-trial conference allowed plaintiffs to amend their Complaint to plead in Contract under the provisions of the so-called Tucker Act (28 U.S.C., sec. 41, subsec. 20; 28 U.S.C., 250 et seq.) or under the Federal Tort Claims Act (28 U.S.C., 921 et seq.) or in the alternative. To the foregoing ruling by the Court the defendant objects.

Conclusion

This pre-trial order has been formulated after a conference at which litigants and their respective attorneys have appeared in open Court. There are no other issues of law or of fact except as embodied in this order and this order supersedes the pleadings as to issues of law and fact. This order will control the course of the trial and shall not be amended except by consent of parties and the Court or by the Court to prevent manifest injustices.

Dated and entered in open Court this 8th day of June, 1948.

/s/ JAMES ALGER FEE,

Judge.

GALLAGHER & GALLAGHER,

Counsel for Plaintiffs.

Counsel for Defendant:

/s/ HENRY L. HESS,

United States Attorney,

/s/ WILLIAM H. VEEDER,

Attorney,

Department of Justice.

[Endorsed]: Filed June 8, 1948.

In the District Court of the United States
For the District of Oregon

Civ. Nos. 3669 to 3853, 3861 to 3865 and 3871

IRA R. URE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

SHEFF WHITE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civ. No. 3855

FINE SHEEP COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civ. No. 3870

IRA R. URE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

OPINION

March 13, 1950

James Alger Fee, Chief Judge:

The present opinion concerns the responsibility of the United States to one hundred ninety-three land-owners, served by the Owyhee Canal, based on two different type claims arising because of the breaking of the canal, which was under governmental control. The first class relates to damages on account of the failure to deliver water because of the break, whereby crops were lost. The second class relates to direct trespass of the water upon lands as a result of the break. These cases were consolidated for the purpose of pretrial conference and of taking evidence as to liability. A representative of the cases depending upon failure to deliver water is that of White's. One of the cases of the Ure's was chosen as illustrative of the causes where damage was claimed by floodings.

After a pretrial conference in this cause, there was entered a pretrial order, from which the agreed facts are drawn for the purpose of this memorandum. The Whites claim to own certain land, which it is agreed is situated within the boundaries of the Owyhee Reclamation Project, and that the irrigable area thereof is arid. The land is also within the Owyhee Irrigation District, a quasi-municipal corporation of the State of Oregon, which entered into a contract with the United States in 1926. By this contract, the District agreed that it would indemnify and hold harmless United States against

any and all costs arising from construction, operation and maintenance of the irrigation system constructed by the defendant to reclaim and serve the irrigated acreage. It is further agreed that on account of drought, inaccuracy in distribution or other causes, there may be shortages in the water supply, and, "while the United States will use all reasonable means to guard against such shortage," the latter and its agents shall have no liability therefor. Sheff White, one of the plaintiffs, entered into a contract with the District, confirming and consenting to the terms of the contract above set out, binding himself, his successors and the irrigable lands to the terms and conditions. The contract was confirmed by decree of a court of competent jurisdiction.

During all of the year 1946, United States was in control of and operating the Owyhee Reclamation Project, including the North canal, which is approximately seventy miles long. A break occurred therein on Sunday, July 14, 1946, at a point about thirty-six miles from the head of the canal. The agents of the government had turned the water into the canal and were controlling the flow of the stream therein. The break was approximately fifty feet wide at its widest point. Water in the canal, which could not be diverted from the canal above and below the break, drained out through the break. Repair work was immediately commenced. On Thursday, July 18, repairs had progressed to a point where the engineer in charge ordered water turned into the canal, which was done. A second

break occurred at approximately 1:30 a.m., July 19, 1946, downstream from the first break.

The Whites had paid all water assessments levied by the District against the irrigable land. Although it is not expressly stipulated, there is no doubt but what the crops depending upon irrigation water were damaged by the lack thereof at the season wherein the breaks occurred.

The Whites have made many contentions as to the failure of the United States to furnish water to mature the crops growing on these lands, but, for the purposes of this opinion, they may be summarized briefly. They contend, as far as crop damage was concerned, that they became parties to the contract between the District and the Government and were entitled to the delivery of the water, to which they had legal title as appurtenant to the reality. It is contended that the United States owed a duty to exercise reasonable care in the construction, operation and maintenance of the canal, and that the breach of this duty in several particulars proximately resulted in the break and the failure to deliver water to the land of the Whites for the period from July 14 to July 31. The amount of the damage was reserved by the Court for trial in the event the issue of liability was determined against the Government.

The Ures, and others who suffered direct damage from the invasion of their lands by the rush of waters from the break, claim that, as a result of the waters' escaping from the canal, their lands

were flooded and a certain portion was washed away and other portions rendered unusable by deposit of sand, rocks and debris, and that the resulting trough separates one portion of the land from the other. Injuries to structures on the land are also claimed. Although other forms of the basic contention are presented, there is one statement of claim in the pretrial order which is entirely comprehensive. It is said that "because the defendant retained exclusive control and management of the project and all its facilities, it was the duty of the defendant to protect the plaintiffs from the flooding." The land where the break occurred was vested in the United States. The fact that the lower side of the ditch was without lateral support, because the terrain sloped off to a marked degree, is set up. It is claimed that the ditch had a capacity of 451 second feet of water, and that there were 450 second feet being carried at the time of the first break. It is also indicated that this column of water was flowing for a distance of 36.15 miles down to and through the break.

The United States contends, first, that the landowners were not parties to the contract between the Irrigation District and the Government, and, as a result, no duty was owed to them. Disposition of this may be made shortly. Sheff White and Ure accepted the burdens of the contract in accordance with a direct provision therein. According to a proviso thereof, the land could not have obtained water unless the District assessments were paid and unless the contract between the Government and

the District were accepted by the landowners. It might thus be indicated that the action was on a contractual liability and therefore could be brought under the Tucker Act. Another phase of the contention of the Government is that, since there was no contractual liability to the Whites, there was no duty owed to them under the contract, and therefore a tort claim for the damage was not maintainable. The argument just above stated also applies to this contention. But neither of these two points need be decided. It makes no difference whether the Whites could sue on the contract or not, either in tort or contract. The Tort Claims Act provides that there shall be a remedy "for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."¹ Under the law of Oregon, by assuming the operation and maintenance of the canal, the Government became a common carrier of water. It thereby incurred the duty to use reasonable care to effect delivery to the Whites of the amount of water called for by the water right which was a real appurtenance to their land. And, since this is all that the plaintiff asks of the Government, whether on the theory of contract, tort based on contract or as a result of the duty established by the laws of the state upon one assuming

¹ 28 U.S.C.A. § 1346(2) (b).

to act as a common carrier of water to lands to which the water right is appurtenant, the same basis for recovery is laid. The Government attorneys contend that, in the construction, maintenance and operation of the canal, there was exercised "a strictly discretionary governmental function of the highest character," and therefore that the Government is specifically exempt under the provisions of the Federal Tort Claims Act, 28 U.S.C.A. § 2680 (a). The Court is of opinion that this argument is entirely unsound. The Government, in order to collect back the money which it had spent upon the construction of the work and the canal and the operation thereof through an easement which it owned, assumed the management and control of the column of water and the duty to deliver. If it were necessary to so decide, it might be held that this was in a proprietary capacity, but, whether or not that be true, the words of exemption in the Act do not apply to such duties as these. It is also contended that, in selecting the course of the canal, the Government agents had no alternative but to construct it over the type of soil upon which it is located, and had to exercise its discretion as to whether it should construct the canal over the character of soil on which it was constructed or to refrain from constructing it entirely.

The gist of the charge of negligence, however, is that it maintained and operated the canal at a full head knowing the character of soil upon which it was built without lining it with concrete, impervious soil or constructing an impervious core on the

lower bank, which was required originally by the plans.

The question of whether ordinary care was exercised by the officers, agents and employees of the Government in the construction, operation and maintenance of the irrigation works, in view of the duty to deliver water to the Whites, comes up for decision. 'The plaintiffs' charges of negligence are now examined.

There was the theory of the plaintiffs that there was some sort of a reservoir in the soft materials of the hill, which backed up the water and held it until the time when it had permeated the whole structure. It is contended this is a serious defect in construction. The Court is inclined to believe from the evidence that the experts called by the Government are more nearly exact and that the explanation is that the structure was below the bottom of the canal. However that may be, it is unquestionable that the defect could have been avoided by lining the canal with concrete at the particular point, building an inner core or a like structure upon the side and bottom of the canal, and finally by digging out the soft structure and permitting the canal to be lined with impervious material. Since the defect in the structure was not discovered at the time of construction, no such measures were taken. However, there is no doubt from the testimony which is now in the record that the defect could have been discovered, had proper tests been taken at the time of construction or afterwards. Competent engineers, however, must admit that the

mere fact that these structures, which would not hold water, were buried four to six feet beneath the canal and over a space of two hundred to three hundred feet along the center line could have been discovered with proper test at the time of construction.

However, plaintiffs here had the burden of proof. A careful reexamination of the evidence shows that the cause of the break was never established and remains conjectural. Another charge is that of failure to provide competent inspection. In this connection, there is no doubt that inspection was provided, but the character of the inspection must be examined.

In the light of the standard of ordinary care, the Court will examine these charges of negligence. If this break had occurred within a few months after the construction of the canal, ordinary care would have required the discovery of the pervious structure, upon the latent existence of which the Government now bases its defense. The essential negligence would have been the release of a full head of water before inspection to insure stability in the canal. If a simple device of building a core would have prevented the disaster, this necessity seems too plain for argument. Likewise, if a break would not have occurred had the canal been lined at this point with concrete, as it is in some other sections, efficient inspection would have disclosed the necessity. As for the idea that the defect was hidden does not comport with the respect which the Court has for the engineering profession to hold that

such a situation, now hypothetically assumed, could not have been discovered and proper precautions taken against a break by thorough inspection during construction.

The Court was not convinced that the attempted explanation of the government experts was valid. It was unquestionably proved that there were structures near the canal at the points which were previous to water, and that these were saturated at the time of the breaks. But the evidence did not disclose why or how the break happened eleven years after construction. Since the burden of proof lay on plaintiffs to establish cause and damage as a proximate result, no liability can be found in this state of the record. In view of the nature of the duty to deliver water, *res ipsa loquitur* does not apply.

A great quantity of water has flown over the dam and through the Owyhee Canal since construction. The Court is of opinion that the canal itself built up a protective covering over these structures, which was only gradually permeated by water. We hold that eleven years of use of this canal would lead persons charged with only the duty of ordinary care to believe that the construction was proper and that the canal would hold a full head of water over irrigation season in the absence of other circumstances tending to destroy that belief. After all, the charge can not be negligence in construction alone, but must be coupled with a charge of negligence of operation under all the circumstances, with the duty imposed as to the irrigators below.

The Court believes the operation of the canal at full head at a time when everyone was crying for water was in the exercise of ordinary care. Now we turn to other circumstances from which warning of the impending break might have been obtained.

This question is whether warning should have been taken from the condition of the ground about the canal and below and about the place where the break occurred. Also, there is a question whether the springs or outlets below were of such nature as to indicate to reasonably prudent persons using ordinary care that the canal was about to break. A great deal of testimony was taken concerning the condition of the fields and ditches close to the embankment of the canal, near the point where the break subsequently occurred. This latter testimony, in the opinion of the Court, was quite weak. The Court was not convinced that any observed conditions referred to did not come from surface water. Nor is great weight to be given testimony concerning the miring of a tractor and a wet condition of soil in the field immediately below the place where the break subsequently happened. The water in the lateral of the farm within a few feet from the toe of the canal bank was, in our opinion, casual. It was either surface water or rain. As a matter of fact, at the time that this water showed up, the canal had no water in it, since the stream had not yet been required for irrigation. There is also some testimony as to heavy growth of willows and other brush near this lateral canal. The brush is

much more likely to have received moisture from the lateral itself. Experience in the irrigation country does not indicate that such circumstances would be taken as indications that a break was going to occur in the main canal.

There is considerable testimony about the appearance of flowing springs below the wall of the canal. The evidence is that from certain of these springs there was a continuous flow of considerable strength. These emanations of water were at a great distance from the canal. Besides this, the statement that the canal must have some outflows might well be true. The opinion of the experts seems to accord the experience of the irrigation country that the suspiration of a canal is apt to denote a healthy condition. Certainly, these springs were well known to the whole countryside, and, if anyone had believed that they were a source of peril, the matter would have been taken up in protest by the landowners on whose property these appeared and other irrigators who depended on the canal for their crops.

As a matter of fact, we have very strong indication here that there were no circumstances such as would have warned a person in the exercise of ordinary care. The farmers themselves, in an irrigation country, are concerned with the maintenance of the main canal, and, if there were any such circumstances which would call attention to the ordinary man the fact that the canal was apt to break, they unquestionably would have been reported to the

Government and we would have had testimony that such warnings were given. There is no such testimony in the record. There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break because of the circumstances mentioned. The Court holds that the absence of ordinary care in this respect has not been demonstrated by this showing.

The next question is as to the competency of the inspection. It is not contended that there was no inspection. This, of course, would have been contrary to fact. There was positive evidence that inspection was carried on regularly twice a day, and that within one-half hour of the break the inspector passed over the road on the bank of the canal and saw nothing which would lead him to believe that a break was imminent. This is shown to have been the usual custom of the Government in regard to inspection. It was unquestionably adequate to fulfill the duty of exercise of ordinary care. It might be contended that the inspector employed was not competent, but there has been no attack upon that basis. The only question involved is whether it was sufficient to have a person ordinarily skilled in irrigation problems to make such inspection or whether it was necessary to have an inspection by a competent engineer who would make appropriate tests. In view of the nature of the duties, however, the Court determines that the inspection made was sufficient. If it had been that the inspector had noticed and suspicious circumstances and dis-

regarded them, thereupon an entirely different problem would have been raised, but in this instance there is no such showing. Therefore, as far as the inspection is concerned, the Court holds that it met the duty incumbent upon the Government to use ordinary care in attempting to maintain the canal and control the column of water.

As to the plaintiffs who complain of loss of crops, therefore, the Court concludes that, as to the first break, there is no responsibility on the Government.

It is then said that the second break was caused by negligence in failing to discover that the structure, which permitted the first break, extended a considerable distance down the canal, as above noted, and that it would not hold water until all of this structure had been scraped out of the bottom and different earth built in. And secondly, that a full head of water was turned in, in the first instance, and that the break resulted from that, whereas, if it had been allowed to build up gradually, the catastrophe would not have happened. There is much less to support this charge than there is to support the charges as to the first break. The record shows that those engaged in fixing the first break took prompt and efficient methods to rebuild the canal at the point where the break had taken place. At that time, no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered. It must be remembered that the action of those repairing the break was action in emer-

gency. The farmers were complaining of the lack of water and of the fact that the first break had occurred. It was imperative to get the water to the irrigators as soon as possible, in order that the crops should not be destroyed. This review is sufficient to clear away both the failure to discover the character of material which caused the first break and the use of a full head of water.

The causes which depend upon failure to deliver water must therefore be dismissed.

The whole aspect of the problem changes when the cases of direct damage by flooding are considered. Here the United States built and controlled a canal capable of carrying a volume of water far beyond the normal capacities of the local streams, under tremendous pressure, by virtue of the planned fall of the ditch. This construction further carried water high above the natural stream beds along the rimrock of the dusty hills. It is shown how the flow was carried by soil structures inept for such burden in this particular place. The United States, for its own purposes, retained complete direction and control of this artificial current. By its agents, the flow was wilfully directed through these structures, and the speed and volume of the column of water was built up, modulated or cut off completely. The parcels of realty of which Ure and others were seized geographically are lower and in positions exposed to the devastating rush of water if a break were to occur. These elements were obvious and the risk deliberately accepted by construction and

especially by operation. The duty to protect rose with the danger.

It seems reasonable, under the circumstances, to impose a much higher duty upon the carrier of water for hire for injury to tenements endangered by the element so devastating when unchained from an elevated position. Methods of imposition of consequences for violations of the duty of governing such an elemental force are various.

There are several methods of approach, both technically and realistically, to the problem of imposition of liability in regard to the casting of a stream of water from higher land upon land of another at a lower level. The first is the absolute liability imposed for such where one controls a dangerous force which escapes and does injury upon nearby lands. The second is the liability where one voluntarily sets in motion a physical body which actually invades or, as the old books say, commits a trespass upon lands of another. The third is the rule that one dealing with a potentially dangerous instrumentality is bound to use the highest degree of care.

The famous decision of *Rylands V. Fletcher*² imposed absolute liability upon one who introduced water on his own land, where the element escaped onto the land of his neighbor. This opinion has caused extended controversy in this country.³ The

²L. R. 1 Ex. Ch. 265, affirmed; *Fletcher vs. Rylands* (1868), L. R. 3, H. L. 330.

³Bohlen, *Studies in the Law of Torts* (1926), p. 344; Pound, *An Introduction to the Philosophy of Law* (1922), p. 183.

weight of authority is against its application in most jurisdictions of this country.⁴ This is explained on the ground of rejection of an anachronistic doctrine inapplicable to present conditions.⁵ It is doubtful that the decisions can be so explained.⁶ The American Law Institute has adopted a caveat.⁷ A great many jurisdictions still apply this doctrine, and there are some decisions squarely in point under the facts here.⁸ There is a great deal of confusion in

⁴Note, 169 A. L. R. 517.

⁵Bohlen, *Studies in the Law of Torts* (1926), p. 352.

⁶Pound, *Interpretations of Legal History* (1923), p. 106.

⁷See note, *Restatement of Torts*, Ch. 21, § 520.

⁸*Bridgeman-Russell Company vs. City of Duluth*, 158 Minnesota 509, 511: "The trend of modern legislation is to relieve the individual from the mischance of business or industry without regard to its being caused by negligence. Our safety appliance acts and workmen's compensation acts are examples. And even in states where *Rylands vs. Fletcher* has been rejected, trespass may be maintained to recover damages for similar invasions of property from other substances than water, and, of course, without proof of negligence. *Hay vs. Cohoes*, 2 N. Y. 159, 51 Am. Dec. 279; *Wheeler vs. Norton*, 92 App. Div. 368, 86 N. Y. Supp. 1095; *Mairs vs. Manhattan*, 89 N. Y. 498; *Sullivan vs. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274 The complaint in the case at bar charges trespass also, but, from the conclusion already reached that the rule of *Rylands vs. Fletcher* should not be disturbed, it is not necessary to place an affirmance of the order upon the ground that a good cause of action for trespass is pleaded."

the American authorities. The supposed doctrine is repudiated or upheld in widely different situations.⁹ It is debated in cases involving waters percolating because of a dam¹⁰ or an irrigation ditch,¹¹ slight overflows from a canal,¹² flooding of land by backing of water,¹³ release of water in minor quantities through waste ditch¹⁴ and other situations.¹⁵ All these must be distinguished from the violent breach of a reservoir by this elemental force stored by the act of a party. Where one is managing a stream of water and loses control, whereby the element rages over the land of another, the cases above mentioned have no applicability. This distinction has been little noted in the opinions.

⁹Jacoby vs. Town of The City of Gillette, 62 Wyoming 487, 169 A. L. R. 502, and note, 169 A. L. R. 517; Healy vs. Citizens' Gas & Electric Company, 199 Iowa 82, 38 A. L. R. 1226, and note, 38 A. L. R. 1244.

¹⁰Healey vs. Citizens' Gas & Electric Company, 199 Iowa 82.

¹¹North Sterling Irr. Dist. vs. Dickman, 59 Colorado 169.

¹²Jacoby vs. Town of The City of Gillette, 62 Wyoming 487.

¹³Wilson vs. City of New Bedford, 108 Massachusetts 261 (condemnation).

¹⁴Parker vs. Larsen, 86 California 236.

¹⁵Cahill vs. Eastman, 18 Minnesota 324; Texas & Pacific Railway Company vs. O'Mahoney, 24 Texas Civ. App. 631; note, 15 L. R. A. (N. S.) 541.

Closely allied to this doctrine is the liability imposed where one, either personally or by agency of some force which he voluntarily sets in motion, trespasses upon the land of another. At common law, with certain minor exceptions not important here, any interference with possession is an act which will entitle the injured party to bring an action in tort. The fact that the act is done accidentally or in good faith or under justifiable error is no defense.¹⁶

The most striking illustration of this doctrine in modern law is found in cases where a trespass is committed on land by virtue of an invasion thereof by falling rocks, earth or other substances occasioned by the voluntary setting off of a blast of dynamite or other explosive.¹⁷ Here the rule of absolute liability is applied because the defendant voluntarily unleashed a force which, contrary to his intention, invaded the lands of another. In these instances, the overwhelming weight of authority¹⁸ is that there is no defense even though the most extreme precautions were used. If the substances had been stored by the owner of adjoining land and had exploded without the owner's intention or knowledge, then the doctrine of the *Rylands* case would apply. The analogy between the blasting

¹⁶Holdsworth viii, 465, also 466-7, iii, 377-8-382, xii, 523-4.

¹⁷Sullivan, *Admr.*, vs. Dunham, 1617 New York 290.

¹⁸Note, 35 A. L. R. 1244.

cases and the stored water cases is indicated in a very interesting opinion of the Court of Appeals of the Second Circuit.¹⁹ The Court there say:

“While the rule laid down by Blackburn, J., in *Rylands vs. Fletcher*, * * * has not been followed in America to the full extent of all its implications, and, at the outset its authority was impaired by *Brown vs. Collins*, 53 N. H. 442, 16 Am. Rep. 372, *Marshall vs. Welwood*, 38 N. J. Law, 339, 20 Am. Rep. 394, and *Losee vs. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, yet in the so-called ‘blasting’ cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris.”

The blasting cases have one element which is not present in the stored water cases, but is present in the instant case. When one voluntarily and deliberately does an act upon his own land which results in a physical trespass upon lands in other ownership, the liability is absolute. In the stored water cases, a condition has been created, the consequences of which may be injury to other land. But in the active release and management of a column of water flowing at a fast rate and in great volume, as in setting off a blast, the person who initiates and carries on the activity is a participant in whatever

¹⁹*Exner vs. Sherman Power Construction Co.*, 2 Cir., 54 F. 2d 510, 513.

results. If the result is a trespass on lands of another, the liability is absolute.

This is not an isolated instance of the doctrine that, where one voluntarily does an act which results in trespass upon land of another, he is absolutely liable. There are opinions which hold that water cast upon another's land, as a result of some act voluntarily done by another, constitutes a trespass,²⁰ whether intentional or not,²¹ and this rule is applicable to acts done by governmental bodies.²²

Due to changing fashions of pleading, the ground of trespass is rarely chosen alone at the present time. The pleader usually thinks that he is safer to place the matter upon a ground of negligence. The Courts, however, in applying the doctrines of negligence, recognize the difference between an inherently dangerous situation and one that will result in a tres-

²⁰*Cartwright vs. Southern Pacific Co.*, D. C. Ore., 206 Fed. 234, 235; see *Fortier vs. H. P. Hood & Sons, Inc.*, 307 Massachusetts 292; *Ryder vs. Town of Lexington*, 303 Massachusetts 281; *Dryden vs. Peru Bottom Drainage Dist.*, 99 Nebraska 837; *City of Jackson vs. Wilson*, 146 Georgia 250. The Oregon Supreme Court adopts the trespass rule in regard to water cast on another's land. *Laurance vs. Tucker*, 160 Oregon 474; *Boulevard Drainage System vs. Gordon*, 91 Oregon 240.

²¹*Hueston vs. Mississippi & R. R. Boom Co.*, 76 Minnesota 251.

²²*Dryden vs. Peru Bottom Drainage Dist.*, 99 Nebraska 837; *Kiefer vs. County of Ramsey*, 140 Minnesota 143; But see *Westerson vs. State*, 207 Minnesota 412.

pass, as differentiated from the ordinary course of events which requires only ordinary care. There are no degrees of negligence, but there are degrees of care. Where a situation has potential elements of extreme hazard, the Courts require a high degree of care and sometimes what they term the "highest degree of care," which does not render the party under such a duty an insurer, but requires him to have in contemplation the perilous potential results of his acts. A procedural corollary of this rule is that the person who is in the exclusive management and control of such a dangerous instrumentality is liable on mere proof of damage occurring as a result of the operation thereof, unless perchance he can establish the injury was caused by Act of God, by the act of a third person or by act of the plaintiff himself. This technical device for fixing liability is commonly called *res ipsa loquitur*. The operation of the rule and its corollary obviously has the same effect as the application of the rule of absolute liability. The dress is more modern, but the body is the same.

The doctrine of *res ipsa loquitur*, in conjunction with a higher degree of care, has been applied in the case of falling objects, handling of electricity,²³ occurrences as a result of defects in or mishandling of machinery, common carriers of passengers,²⁴ fires

²³Boyd vs. Portland Electric Co., 41 Oregon 336.

²⁴Budd vs. United Carriage Co., 25 Oregon 314.

and explosions and particularly from escaping water.²⁵

This critique of theories is of no value except to clear the ground. Congress, by the pertinent act, has consented that the sovereign be liable only where an individual would be under the law of the particular state under the particular circumstances. There is no direct decision of the Supreme Court of Oregon, which establishes liability upon a private citizen under the exact fact. That tribunal has never directly dealt with a violent break in the large irrigation canal whereby the water did damage to lands in a lower position. But the opinions of that Court are not the entire orb of the law. The apothegm of the common law was that the law existed covering every possible concatenation of events, and that the applicable rule could be discovered by research and then declared. The ultra-modern stop-gap, which replaces this barrier of antiquity, is pragmatic. Present day federal courts are bound by necessity to speculate upon what the judges of the particular state would do if confronted with the exact facts then presented for decision.

Article XVIII, provision 7, of the Constitution of the State of Oregon and the Act of June 27, 1844, together constitute a declaration that the common law of England shall constitute a part of the law of Oregon, unless the common law doctrines were

²⁵Kahn vs. Triest-Rosenberg Cap Company, 139 California 340.

modified by the enactment of pertinent statutes.²⁶ The legislature of the State of Oregon has enacted a statute which reads as follows:

“Every corporation constructing a ditch or canal, flume or reservoir, under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributable in whole or in part to the wrongful interference of another with said ditch or canal, flume, or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporation.” *Laws of Oregon, 1891, page 57, § 16, 116 O. C. L. A. § 408.*

“Every corporation constructing a ditch or canal or flume under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or de-

²⁶*Lytle vs. Hulen, 128 Oregon 483.*

mand.” Laws of Oregon, 1891, page 58, § 18, 116 O. C. L. A. § 409.

It is contended that these paragraphs bind the United States as a “corporation constructing a * * * canal * * * under the provisions of this act.” Although other courts have adopted far-reaching constructions in order to accomplish what were believed to be desired ends, the reasoning thereof is not persuasive.²⁷ The United States was not within the scope of the intention of the legislature. However, this enactment contains a clear recognition of the common law principles relating to responsibility for the maintenance of a canal or ditch used by a carrier of water. The common law principles were therefore not modified by statute but exists today for the governments not only of the corporations organized under that Act but also for all other purposes in a like situation.

The rule relating to private parties in the State of Oregon is the pole star here. A review of the various theories of liability, as noticed by the Supreme Court of Oregon, will therefore be helpful. That tribunal has from an early period of its history given definite approval to the doctrine of the Rylands case in a series of decisions. So emphatic has such approval been that Oregon is usually noted in the texts, law review articles and compilations as one of the states accepting that doctrine. It is to

²⁷Hulbert vs. Twin Falls County, 327 U. S. 103, reversing Twin Falls County vs. Hulbert, 66 Idaho 128, which held that a sovereign state was not bound by indefinite language in a federal controlled state.

be noted that there is probably no opinion in which that court squarely applied the principle. In *Esson vs. Wattier*, 25 Oregon 7, the court refused an injunction against the construction of the dam, which it was claimed would cause water to seep upon the premises of plaintiff. Such an injury the court held would be within the rationale of the *Rylands* case, which is cited and quoted. In *Mallett vs. Taylor*, 78 Oregon 208, which was also an injunction case against percolation and minor overflow from an irrigation ditch, the injunction was granted. The court there cited the *Esson* case and cited and quoted the *Rylands* case. Mr. Justice McBride, speaking for the court, quoted from the laws of Hammurabi as follows:

“ ‘If a man neglect to strengthen his dyke and do not strengthen it, and a break be made in his dyke and the water carry away the farm land, the man in whose dyke the break has been made shall restore the grain which he has damaged. If he be not able to restore the grain, they shall sell him and his goods and the farmers whose gain the water has carried away shall share in the results of the sale’: Harper’s Code of Hammurabi, §§ 53, 54.”

He also comments:

“If we eliminate the severe ‘proceedings supplemental to execution,’ the law is practically the same today as it was in the year 2250 B. C.”

The court, however, found in this case that there was proof of negligence and therefore granted an injunction. In *Patterson vs. Horsefly Irrigation*

District, 157 Oregon 1, the court held that instructions in a seepage case, which the court interpreted as making an irrigation district "and all its directors insurers against damage of any and every nature resulting from construction, operation or maintenance" of the system without regard to negligence, were erroneous.²⁸ This case, of course, cannot be assumed to set aside the approval given to the Rylands case in previous opinions. Mr. Justice Bailey, who wrote this opinion, also wrote the opinion in the case of Suko vs. Northwestern Ice & Cold Storage Co., 166 Oregon 557, wherein damage was claimed on account of the breaking of an elevated tank used for storing water by a lessee, whereby adjoining premises were invaded by its collapse, and personal injuries resulted. There the court cites *Esson vs. Wattier*, *Mallett vs. Taylor*, and *Rylands vs. Fletcher*. Although that case is finally also decided upon principles of the highest degree of care and the application of *res ipsa loquitur*.

The doctrine which imposes strict liability in case of trespass has been adopted and followed in the State of Oregon. Where defendant exploded a large blast of powder, throwing debris all over the residence of the plaintiff, it was indicated that there was liability because the plaintiff was frightened

²⁸Hon. Arthur Hay, now an Associate Justice of the Oregon Supreme Court, was the trial judge. The instructions laid down the correct rule in accordance with previous Oregon cases, but were somewhat ambiguous.

and fanted as a result thereof. *Salmi vs. Columbia & N. R. R. Co.*, 75 Oregon 200. It has also been held that, where there was a flood of a stream, a corporation maintaining a dam could not suddenly release large quantities of water in addition to the flood water from its dam and, if property lower down on the stream were thus inundated, the corporation would be liable. *Crawford vs. Cobbs & Mitchell Co.*, 121 Oregon 628. It will thus be seen that the Oregon court recognizes the forms of liability which follow from the adoption of a common law in the Constitution of the State.

In any event, the decisions of the Supreme Court of Oregon, with regard to water, have generally dealt with percolation, infiltration or minor overlapping of the canal bank. As noted above, there has been no case where recovery has been sought for a major breach in the bank of a large canal. As a result of this and the tendency upon the part of lawyers modernly to use negligence as the basis for liability in all cases, this doctrine has usually been made the basis for recovery. In *Emison vs. Owyhee Ditch Co.*, 37 Oregon 577, it was held that it was improper to instruct that, if plaintiff cast water on her own land, that was contributory negligence to the act of the defendant, whereby water from defendant's ditch overflowed her premises. It is obvious that the action should have been for trespass, then the problem would not have arisen.

In *Taylor vs. Farmers Irrigation Co.*, 82 Oregon 701, there was complaint for injunction to seepage from an irrigation canal. The trial court held that

the "ditch or canal was properly constructed and had been kept in good repair, and that the water flowing therein did not seep or escape on plaintiff's premises." The evidence showed none, and the case might have been decided on this basis. However, the court holds negligence must have been shown. In a series of percolation or minor overlapping cases, the court has followed that principle.²⁹ In the case which is most like the facts in the case at bar, as noted above,³⁰ the Oregon Supreme Court applied a negligence rule of a very drastic character. There, as noted above, an elevated water tank on premises in exclusive possession and control of a lessee, burst and injured plaintiff in a house on adjoining property. 3 Kinney on Irrigation and Water Rights, 2d Ed., § 1669, page 3069, was quoted as follows:

"Water, at times, is a most dangerous element even flowing in its natural condition, without the influence of man; and, when formally restrained by the works of man, it suddenly breaks through its barriers and tears through the lands below to the great destruction of life and property, it becomes even more dangerous. Therefore, in a previous section of this work, we stated to the effect that it is the duty of all irrigation or water companies, especially in the

²⁹Mallet vs. Taylor, 78 Oregon 208; Patterson vs. Horsefly Irrigation District, 157 Oregon 1; Kaylor vs. Recla, 160 Oregon 254.

³⁰Suko vs. Northwestern Ice Co., 166 Oregon 557, *supra*.

construction of dams and reservoirs for the storage or the holding back of great quantities of water, to so construct them that they will be of such a strength as to withstand all pressure of water on both ordinary and extraordinary occasions, so far as skilled human foresight can determine, and with that reasonable degree of care as it commensurate with the nature and magnitude of the undertaking, in order to protect the lives and property of those below.”

Rylands vs. Fletcher, *supra*, and the Oregon decisions following the doctrine are cited. The duty of one bringing water upon premises under his exclusive control, say the court, and storing it in an elevated position, was proportionate to the injury which might result if it escaped. The doctrine of *res ipsa loquitur* was applicable, the court decided, because negligence was proved by the bursting of the tank. Since a high degree of danger calls for a very high degree of care, inspection by untrained persons was no defense, but that the examination by a highly trained tank expert might be required.

This Court holds that the Oregon Supreme Court, if faced with the exact facts here, would apply the rule of absolute liability.

Since the pretrial order is sufficiently broad in the questions propounded to cover any and all of these theories of liability mentioned in the opinion, we need not determine whether application is made of the absolute responsibility of the manager of an elemental force or because of a trespass *quare clausum fregit* or because of the theory of an action

on the case for negligence, reinforced by the necessity of explaining how structures erected by defendant and under its control happened to break when subjected only to normal tensions and strains, which these were built to withstand.

The evidence would clearly bring this case in the purview of the Rylands case. Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof. Defendant not only brought the water into an elevated position above the lands of plaintiff, but continued to have it flow there, although no sufficient guard was placed to prevent the water from flowing onto the lands of plaintiff. If then this doctrine, so often quoted with approval by the Supreme Court of Oregon, were applied, plaintiff should recover.

The defendant voluntarily, for the purpose of reimbursing itself for outlay, assumed the control of this elemental force, which was a stream 36 miles long, flowing rapidly and carrying 450 second feet of water. The water invaded the lands of plaintiff and did damage as a consequence of the voluntary act of defendant in turning the water into the canal above. This is a trespass for which liability follows at common law and under the Oregon decisions.

The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. When plaintiffs proved the

collapse of the wall of the canal and the injuries suffered by him, he made out a *prima facie* case of negligence. "A very high degree of danger calls for a very high degree of care, which, however, amounts to no more than ordinary care in such a case."³¹ The defendant, knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens.

Even though one may receive water which gives life to his land through the same ditch which is the origin of his disaster, it cannot be conceived why he should bear the full onus thereof while his fellow landowners, whose prosperity is based upon the same operation, and the carrier who transported the water for hire should go scot free. To make this concrete, there is no reason why Fine Sheep Company or Ure should assume the entire burden of damage to his property because of the escape of this raging stream of water. The stream was introduced to aid in the building of the prosperity of the community and in the reclamation of the desert, but there is no circumstance which appeals to this court which dictates that a private individual bear the loss instead of the person or corporation who volunteered for consideration to carry water to the whole

³¹*Suko vs. Northwestern Ice & Cold Storage Co.*, *supra*, page 571.

project. If a corporation were so carrying the water, it would be liable under the statute, which simply crystalizes the common law. A private person would be held upon the common law doctrine of trespass and upon the public policy which underlies the statute and the decisions of the Oregon Supreme Court. Under these circumstances, there is no reason why the United States should not be liable under the enactment subjecting the Government to tort liability.

Since this determination of what the law of Oregon is has been made the only defense of the Government, this will be dealt with. The exclusionary clauses of the Act do not cover this case. This is not a discretionary function. The matter of planning and construction of an irrigation canal can be the subject of failure to exercise a higher degree of care upon the part of the servants of the Government, as well as the servants of a private corporation. The contractual liability of the Irrigation District to the United States is not decided at this time.

There is one suggestion made upon argument which must be rejected with scorn. It is said that, if the Government is held to responsibility for breaks in the canals and dams which it has constructed, it will effectually dampen the ardor of the bureaus for constructing other works. This suggestion is amoral at least.

The determination of the Court is that the Government is liable in the flooding cases. These cases

will therefore be set for trial in order to fix the damage as to each tract involved.

Original Endorsed, Filed May 11, 1950.

Corrections Filed November 6, 1950.

In the District Court of the United States
for the District of Oregon

Civil No. 3669

One of Consolidated Cases Civil Nos. 3669 to 3853,
Inclusive, and 3861 to 3865, Inclusive, and 3871.

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

By an order dated June 8, 1948, with the consent of the attorneys of record, and in accordance with the Federal Rules of Civil Procedure, Rule No. 42, this Court consolidated for trial Civil Nos. 3669 to 3853 inclusive, 3861 to 3865 inclusive, and Civil No. 3871. Pursuant to that order there were fully tried the common questions of law and fact respecting the liability of the United States of America to

the plaintiff(s) in those actions for damages arising from the allegedly negligent failure of the United States to supply water for purposes of irrigation. The case above captioned is one of those consolidated actions. Upon the testimony and evidence adduced at that trial the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The lands involved in these cases are arid in character and are situated within the boundaries of the Owyhee Reclamation Project constructed by the defendant pursuant to the Federal Reclamation Laws, being the Act of June 17, 1902 (32 Stat. 388) as supplemented and amended.

2. All of the irrigable lands involved in this case are situated within the boundaries of one or the other of the irrigation districts referred to in paragraph 8 of these findings, quasi-municipal corporations, organized and existing pursuant to the laws of the State of Oregon.

3. The defendant and irrigation districts referred to in paragraph 8 of these findings entered into contracts (hereafter referred to as the contracts) which contracts provided among other things, that irrigable lands within the districts are entitled to delivery of the proportionate share of water actually available under the Owyhee Reclamation Project each irrigation season but not more than required for beneficial use on the lands. The defendant, during the 1946 irrigation season, had

water available to deliver a maximum of four acre feet per irrigable acre for the minimum charge.

4. It was covenanted and agreed, among other things, by and between the defendant and the irrigation districts in the contracts, that the said districts would indemnify and hold harmless the defendant against any and all costs arising from the construction, operation and maintenance of the irrigation system constructed by the defendant to reclaim and serve the irrigated acreage within the said districts and that the provisions pursuant to which the said districts so stipulated are in all the contracts substantially as follows:

Computation of Costs

The cost of which under this contract the District obligates itself to pay a pro rata share, as determined by the Secretary, shall embrace all expenditures of whatsoever kind, in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal work, superintendence, administration and overhead, right of way, property and damage of all kinds, and shall include all sums expended by the United States in surveys and investigations in connection with the irrigation of the project lands, both prior to and after the execution of this contract, and the expense of all soil investigations and other preliminary work and land appraisal provided for in Articles 41 and 42 hereof, and shall also include the expense incurred by the United States in operating or maintaining any of

said works prior to the taking over of the operation and maintenance thereof by the said Board of Control provided for herein as the operating agent of this District and the other districts which may by contract with the United States become entitled to receive water from said works.

Shortage of Water

On account of drought, inaccuracy in distribution, or other causes, there may occur at times a shortage in the water supply for lands of the District, and while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States, its officers, agents or employees for any damage, direct or indirect, arising therefrom, nor shall any obligation provided for herein be reduced because of any such shortage or damage.

5. The contracts likewise provided that every landowner within the districts would be considered to have consented to the provisions of the aforesaid contracts and to have been bound by the terms and conditions thereof, if he did not object to the confirmation of the contracts by the Court having jurisdiction thereof or the proceedings authorizing the same, or if he received and used water made available through the irrigation works of the Owyhee Project There terms were used:

Accepting Benefits Waives Objection

Every landowner of the District who offers no

objection to the confirmation of this contract by the court, or the proceedings authorizing the same, or who accepts the benefits thereof by receiving or using water made available through the works constructed by the United States, thereby consents to all the provisions of this contract and waives any objection thereto.

6. The plaintiff(s) in this case entered into a contract with one the irrigation districts named in paragraph 8 hereof, ratifying, confirming and consenting to the terms of the contracts between the defendant and the irrigation districts, binding themselves, their heirs, successors and assigns and so binding the irrigable lands described and involved herein, to all the terms and conditions of the contracts.

7. Neither the plaintiff(s) or their predecessor(s) in interest objected to the confirmation of said contracts between the defendant and the irrigation districts or the proceedings authorizing the same at the time of the confirmation of the contracts by the court nor at any time, but to the contrary, the plaintiff(s) and/or their predecessors in interest have utilized irrigation water and have accepted the benefits which have been provided by the contracts and have enjoyed all of the benefits available under said contracts.

8. Decrees were duly entered by courts of competent jurisdiction, confirming contracts between the defendant and the following districts:

	Dated
Owyhee Irrigation District	10/14/1926
Gem Irrigation District	10/14/1926
Ontario-Nyssa Irrigation District	2/ 5/1927
Payette-Oregon Slope Irrigation District	10/14/1926
Crystal Irrigation District	11/28/1931
Bench Irrigation District	10/ 5/1931
Slide Irrigation District	10/14/1926
Advancement Irrigation District	9/ 1/1936

Each of the contracts between the defendant and the above-named irrigation districts contains provisions similar in substance with the paragraphs quoted in Nos. 4 and 5 of these findings.

9. During all of 1946, the defendant was in control of and operating the Owyhee Reclamation Project, including the north canal of the Owyhee Reclamation Project, which canal is approximately 70 miles long. A break occurred in the north canal on Sunday, July 14, 1946, at a point approximately 36.15 miles from the head of the canal and near the west line of and in Sec. 1, T. 19, S., R. 46 E., W. M. The break was approximately 50 feet wide at its widest point. The water in the canal, which could not be diverted from the canal above and below the break, drained out of the canal through the break, and repair work was immediately commenced. On Thursday, July 18, 1946, repairs had progressed to a point where the engineer in charge of the repair work ordered water turned into the canal, which was done. A second break occurred at approximately 1:30 a.m., July 19, 1946, downstream from the first break. The canal was repaired and being operated under full capacity on the 31st day of July, 1946.

10. Water users, including the plaintiff(s), dependent upon the north canal for a supply of water for purposes of irrigation immediately following the first break were in immediate need of water and the defendant instituted and carried forward the work of repair under emergency conditions at utmost speed.

11. The burden of proof lay on plaintiff(s) to establish by fair preponderance of the evidence that the proximate cause of the alleged damage was some negligent act or omission on the part of the defendant, and the plaintiff(s) have failed to sustain that burden.

12. It was the duty of the defendant to exercise reasonable care in the operation of the north canal to enable it to deliver water to the plaintiff(s) for irrigation purposes.

13. It was the duty of defendant to exercise reasonable care at all times herein involved in the construction, operation, maintenance, and repair of the north canal, including proper inspection and for all purposes pertinent in these cases. The plaintiff(s) failed to prove by a preponderance of the evidence that the defendant failed to exercise that degree of care.

14. The defendant, based on its knowledge of the construction, operation, and maintenance of the canal under its system of inspection, was not bound to anticipate the breaks and the plaintiff(s) have failed to establish by a fair preponderance of the evidence that the defendant had such knowl-

edge or information as would cause it to anticipate such breaks and the defendant in the exercise of ordinary care was not bound to anticipate that breaks would occur.

15. The evidence established that the defendant, acting in an emergency, took prompt and efficient methods to rebuild and repair the north canal subsequent to the first break, and reasonable care was exercised to determine the cause of said break, and the work of repair of the break was done and completed promptly, with reasonable care and in a good workmanlike manner.

16. The evidence established that at the time of making the first repair, the defendant made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; and that at the time the first repair was made, the defendant did not know the cause of the first break, and that defendant did not know of anything that would cause it to anticipate the occurrence of the second break.

17. The evidence adduced by plaintiff(s) failed to establish the cause of either the first or the second break in the north canal. The evidence adduced by defendant established that subsequent to the second break, there was discovered situated beneath the floor of the canal a weak stratum of earth formation.

18. Respecting both the first and second breaks of the north canal the plaintiff(s) failed to prove that the defendant did not use reasonable care in

the construction, maintenance, operation, inspection, or repair of said canal.

Based upon the record and findings of fact herein, the Court makes the following

Conclusions of Law

1. This court has jurisdiction of the claim specified in the complaint herein.

2. The burden of proof lay on plaintiff(s) to establish by a fair preponderance of the evidence that the proximate cause of the alleged damages was some negligent act or omission on the part of the defendant.

3. The evidence does not establish that the proximate cause of plaintiff(s)' alleged damage was caused by any negligent act or omission on the part of the defendant.

4. Plaintiff(s) have failed to establish that the defendant did not exercise reasonable care in the construction, operation, maintenance, repair, or inspection of the north canal at all times in controversy.

5. The defendant is entitled to judgment and judgment shall be entered on the merits in favor of the defendant, against the plaintiff(s) in this case, all in accordance with the opinion of this Court which has been filed in the consolidated cases.

/s/ JAMES ALGER FEE,
Chief Judge.

[Endorsed]: Filed June 22, 1950.

In the United States District Court
for the District of Oregon

Civil No. 3669

One of Consolidated Cases Civil Nos. 3669 to 3853,
Inclusive, and 3861 to 3865, Inclusive, and 3871

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

The above-entitled case having come on regularly for trial in open court, the court having heard the evidence therein, and the arguments of counsel; and having entered its findings of fact and conclusions of law herein it is hereby

Ordered, Adjudged and Decreed that plaintiff(s) take nothing by their complaint herein; that the defendant have judgment herein on the merits against the plaintiff(s); and that defendant recover from plaintiff(s) its cost and disbursements in this action, and that execution issue therefor.

Done and dated in open court this 22nd day of June, 1950.

/s/ JAMES ALGER FEE,
Chief Judge.

[Endorsed]: Filed June 22, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Sheff White, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment of Dismissal entered in this action on the 22nd day of June, 1950.

/s/ P. J. GALLAGHER,
Of Counsel for Sheff White.
Address: Ontario, Oregon.

[Endorsed]: Filed August 21, 1950.

In the District Court of the United States
for the District of Oregon

No. Civ. 3669

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. Civ. 3871

IRA R. URE and EDNA B. URE, Husband and
Wife; EDWARD C. MUIR and MARY W.
MUIR, Husband and Wife; and CLARENCE
ROBERTS and AFTON W. ROBERTS, Hus-
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Before: Honorable James Alger Fee,
Judge.

Appearances:

GALLAGHER & GALLAGHER,

Attorneys for Plaintiffs in Case Civ. No.
3669.

LYTLE, KILPATRICK & CAMPBELL,

By LYTLE & KILPATRICK,

Attorneys for Plaintiff in Case Civ. No.
3871.

HENRY L. HESS,

United States Attorney.

LINUS M. FULLER,

Special Assistant to the United States
Attorney.

W. H. VEEDER,

Attorney, Department of Justice, Lands
Division.

JASON D. LEE,

Special Attorney, Department of Justice,
and

HOWARD R. STINSON,

Regional Counsel, Bureau of Reclamation,
Department of the Interior of the United
States.

Attorneys for Defendant.

TESTIMONY AND PROCEEDINGS

Wednesday, June 9, 1948

Mr. P. J. Gallagher: Does your Honor care to have us make any opening statements at all?

The Court: You may follow your own wishes in that regard, Mr. Gallagher. If you want to make an opening statement, you may do so.

Mr. P. J. Gallagher: I won't make an opening statement, but I might make a very short statement as to features of the case the witnesses are going to be offered upon, and this afternoon we are going to start with the group of witnesses who will testify as to their observations of the terrain and territory immediately under the ditch, as to whether there was a seepage of water coming from the ditch. That will be the purpose of the several witnesses.

The Court: Is there a map now in the record?

Mr. P. J. Gallagher: There is a map in the record. We have drawings of the terrain and surface of the ditch.

The Court: Is there a general map of the area?

Mr. Hess: Yes, your Honor, there is one in the evidence.

The Court: Let's have that introduced in the evidence and put up.

Mr. Hess: If your Honor please, before any evidence is [3*] introduced in the case, now that the pre-trial orders have all been entered in the case, the Government moves for an order requiring the plaintiffs to elect under what theory they will try the cases here, whether under the Federal Tort

*Page numbering appearing at top of page of original Certified Transcript of Record.

Claims Act, 28 U.S.C.A. 921, et seq., or under the so-called Tucker Act, 28 U.S.C.A. 41, subsection 20.

Mr. P. J. Gallagher: It has always been our position, your Honor, that it is not necessary for us to make any election. We have always argued that we are not required to make any election, so long as our pleadings come within the purview of the language of the Act; whether it is a tort or a wrongful act or omission of the Government, it gives rise to a cause for claim. So long as our pleadings and the testimony come within that language, it is immaterial whether it is violation of contract or a pure common-law tort or pure common-law negligence. The issues have been framed on both theories, your Honor.

The Court: Motion denied.

Mr. P. J. Gallagher: Call Mr. Sproul.

The Court: Let's get this map up first.

Mr. P. J. Gallagher: Oh, yes. I beg your pardon. Are you sure you got your map in?

Mr. Hess: Shouldn't we introduce our map and the exhibits and all of them that take care of the contracts and so forth?

Mr. P. J. Gallagher: Yes, I would go for [4] that.

Mr. Hess: If the Court would prefer it to go in the other order that makes no difference to us.

The Court: I don't care how you put it in. The order of proof lies in your hands. The Court has no interest in it.

Mr. Gallagher: What exhibit number is that?

Mr. Hess: Defendant's Exhibit No. 35.

Mr. P. J. Gallagher: We have now been handed Exhibit No. 35, your Honor, which is a map of the whole project.

The Court: Any objection?

Mr. Hess: To its introduction? No, your Honor.

The Court: All right, have it marked.

The Clerk: 35 received.

(Owyhee Irrigation Project Map No. 23300A, so offered and received, having previously been marked for identification, was thereupon marked received as Defendant's Exhibit 35 in Civil Cases Nos. 3669, 3871, and cases consolidated therewith for trial.)

Mr. P. J. Gallagher: May we put that up?

The Court: Yes, post it up there. Will you supervise that, so that north is at the top.

Mr. P. J. Gallagher: Yes; and will you put that up so that we will have room for some others. Would it suit your purposes better to introduce all the exhibits? [5]

Mr. Hess: Counsel suggests that we might introduce all of the exhibits at the present time, your Honor, and we have no objection, if you wish to do that.

Mr. P. J. Gallagher: It won't take too long a time. Are you going to offer them one at a time or all together?

Mr. Hess: I will offer them one at a time, and then if there is any objection you can make it.

Mr. P. J. Gallagher: It will take all afternoon to do it.

Mr. Hess: Well, you don't need to offer your

photographs, but the contracts as the basis of your claim.

The Court: I think you might offer those that there is no disagreement upon, introduce them all at this time.

Mr. P. J. Gallagher: Very well, your Honor.

The Court: If you want to offer them en masse, if there is no objection, you may do so, or offer them one by one and enter your objections, just as you wish.

Mr. P. J. Gallagher: Plaintiff at this time wishes to introduce all of the exhibits that are enumerated in the pre-trial orders and numbered as being plaintiffs' exhibits.

Mr. Hess: We renew the objections that we have had made in the pre-trial orders, your Honor. We object to the competency and materiality of plaintiffs' photographs, Exhibit No. 27, No. 7,—

Mr. Lytle: No. 7?

Mr. Hess: No. 27, and to Exhibits Nos. 61 and 62, on the [6] ground that they are irrelevant and immaterial,—61 and 62 are the applications for appropriation of water, to the State. We object to Exhibits 68 to 79, inclusive, being photographs taken during the year of '48, as being too remote and do not disclose the condition of the canal at the time of the breaks. And we object to Exhibits Nos. 80, 81 and 82, profile maps, in that they do not show the real condition of the canal at the place, the point of the break, and they are irrelevant and immaterial.

The Court: The Court admits all the other ex-

hibits except those objected to and will reserve ruling upon the objections until further proof is offered.

Mr. P. J. Gallagher: I will lay a further foundation.

The Court: Yes.

Mr. Hess: Yes, and that would apply also to our objections to the introduction of exhibits marked 34, 36, 37, 38, 39, 40 and 41,—Oh, that is our exhibit. We don't want to put that in. I got down too far.

The Court: That objection is overruled.

Mr. Hess: Now, your Honor, the Government offers all of its exhibits that have been designated in the pre-trial orders.

Mr. P. J. Gallagher: There are two or three of those we had formal objection to in the earlier pre-trial orders, and we will designate those in just a moment.

The Court: That relates to the objection just raised by [7] the Government?

Mr. P. J. Gallagher: Yes, I think that is right. Relating to the objections, we have made objections prior hereto to Exhibits 34, 36, 37, 38, 39, 40 and 41, on the basis that they are incompetent, irrelevant and immaterial and not pertaining to the proof of any issue at the trial herein, and I presume that the same ruling could prevail there, that when they are really being considered then we will renew our objection. Oh, yes, and then there is another set of exhibits that we wish to object to, your Honor: Exhibits Nos. 36, 37, 38, 39, 40 and 41, being photostatic copies of contracts between the Government

and the other irrigation districts, are objected to as incompetent, irrelevant and immaterial and not competent to prove any issue in this case.

The Court: The Court will reserve ruling on all these until further proof is offered.

Mr. P. J. Gallagher: Very well, your Honor. We will call Mr. Sproul.

The Court: And the other defendant's exhibits are admitted, except those on which specific objection is made, on which the Court has reserved ruling.

Mr. P. J. Gallagher: Yes.

(The various exhibits referred to, so offered and received, were thereupon marked received as directed by the Court.) [8]

JEROME SPROUL

was thereupon produced as a witness in behalf of the plaintiffs and was examined and testified as follows:

The Clerk: Will you state your name, please?

A. Jerome Sproul.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher.

Q. Mr. Sproul, your full name is George Sproul?

A. Jerome Sproul (spelling), J-e-r-o-m-e.

Q. And you are commonly known as Jerry Sproul? A. Yes, sir.

Q. How long have you lived in this community, Mr. Sproul? A. Since March, 1938.

(Testimony of Jerome Sproul.)

Q. What is your occupation or profession?

A. I am a farmer.

Q. Are you a water user under the Owyhee Project?

A. Yes, sir.

Q. Generally speaking, without going into detail, where is your farm in relation to the place that the break took place in '46?

A. Generally speaking, it is about six miles southwest of the break.

Q. That would be on what lateral?

A. Northwest of the break, instead of southwest. [9]

Q. Northwest of the break?

A. Yes.

Q. And what lateral are you served from?

A. I believe it is 410.

Q. That is the number?

A. Yes.

Q. And what territory does it serve, generally speaking?

A. Well, it would serve the Lincoln Bench.

Q. That would be on the south side of the Vale-Ontario highway and some six miles up from the pipe line?

A. Yes.

Q. Now, were you at the break shortly after it took place in July, 1946?

A. I was.

Q. Will you tell the Court about when you got there in relation to the time that the ditch first broke?

A. I was there after the ditch broke the second time, about twelve hours after it broke.

Q. Were you there at the time it broke the first time, after that?

A. No.

(Testimony of Jerome Sproul.)

Q. That was your first trip down after either of the breaks?

A. That was the first time that I visited the break, yes.

Q. Did you observe the conditions relating to the break in the territory surrounding it? [10]

A. Yes, I climbed down through the break where the ditch had washed out and walked across the patch of ground there to the north, and I noticed a decided seepage there.

Q. How much area did you observe to be in that condition?

A. Well, as I remember, it was between 150 and 250 feet from the break north to the edge of the seepage.

Q. Did you observe the extent of that area as it extended eastward from the ditch?

A. Yes, I did at the time. As I remember now, it was between four and five hundred feet.

Q. That would be a patch, then, that you observed at that time, of 150 to 200 feet wide and how long deep?

A. About, oh, I would say from 450 to 500 feet.

Q. Did you observe washing that had been washed out by the water from the break?

A. Yes, very decidedly.

Q. And the area that you examined, would that be north or south of that wash?

A. It would be north.

Q. Did you then or shortly thereafter observe

(Testimony of Jerome Sproul.)

the condition of the area on the south of the wash?

A. No, I did not.

Q. I will ask the Bailiff to hand you what has been marked as Plaintiffs' Exhibit No. 82 and to examine that paper. Calling your attention to a document marked as Plaintiffs' [11] Exhibit 82, I will ask you if that drawing outlines substantially the part of the area that you have just been talking about as you having examined?

A. Yes, this drawing would just about represent the wash as I saw it at that time.

Q. Does it represent about the area of land that you examined and noticed to the north of the wash?

A. Just about, yes.

Q. I call your attention to the fact that that drawing is made on a scale of one inch to every 50 feet, or 50 feet to an inch, and ask you if that coincides with about the area that you examined?

A. Yes, I believe it does.

Mr. Veeder: We object to that, your Honor. The witness has not been qualified to testify as to what appears on the map or that he would be capable of analyzing what the exhibit is intended to depict.

The Court: Overruled.

Mr. P. J. Gallagher: That will be all at this time, now, Jerry.

Mr. Hess: There is one other objection that I would like to put in there, that this is a half-mile away from the break.

The Court: That goes to the weight and not competency.

(Testimony of Jerome Sproul.)

Q. (By Mr. P. J. Gallagher): Mr. Sproul, counsel has made the observation that this area that we have been talking about is [12] a half-mile away from the break. What is the fact as to the location of this area and the break, the location of the break?

A. I don't know as I understand your question, but the wash that I saw when I was at the break was not a half-mile from the break. This area that I said that I walked across and noticed a seepage in was not a half-mile from the break; it was right at the break.

Q. How close was it up to the embankment?

A. It came up to the embankment.

Q. And this wash that you speak about, where did it lie in relation to where the break actually occurred in the ditch?

A. It started at the break and extended down the hill, down through a canyon—a little draw there.

Q. Now, have you been back recently and after they fixed the break up?

A. Yes, I visited that place about the middle of March, I would say between the 20th and the 25th of March, 1948.

Q. And in filling the break have there been part of the little washes that touched up into the break filled in?

A. You mean this washout that the water flowed in after——

Q. Yes. A. Yes, it had been.

Q. That has been filled in? A. Yes.

(Testimony of Jerome Sproul.)

Q. Now, were you out there during the month of March with [13] Mr. Merritt and one of the Mr. Bronkens, engineers, and Mr. Bouton?

A. Yes, I was.

Q. And at that time did you go over this area with one of those engineers?

A. Yes, quite thoroughly.

Q. Do you remember which one it was?

A. I am not sure of the name, but I can point him out to you.

Q. I see. A. I believe it was Mr.——

Q. Was it Mr. Merritt, the older gentleman?

A. It was the largest one of the older gentlemen.

Mr. Gallagher (To a gentleman in the audience):
Will you stand up.

Q. Was it this Mr. Bronken you were out there with?
A. No, it was not.

Q. Was it Mr. Bronken, or one of the others?

A. It was Mr. Bouton.

Q. Oh, Mr. Bouton. (A gentleman in the audience arose to his feet.)

A. Yes, that is the man.

Mr. P. J. Gallagher: That will be all at this time, Mr. Sproul. I was just calling him for the purpose of laying a foundation. He will be back on the stand. [14]

Cross-Examination

By Mr. Veeder:

Q. Mr. Sproul, would you state the evidence of seepage that you observed on the canal?

(Testimony of Jerome Sproul.)

A. Well, I walked from this wash north, as I stated before, and I noticed that there was no crops growing on that piece of ground and there was no arrangements made to irrigate—that is, it was not corrugated—and I noticed a decided amount of moisture there and I reached over and picked up a handful of it and I would have pronounced it too wet to plow.

Q. That was the only evidence that you observed of the seepage?

A. Well, I also noticed that it was decidedly uphill from the break. The water would have had to have run uphill from the break to have gotten from the break over that area.

Q. Was it on the toe of the canal, or would you have located it on the bank of the canal?

A. Well, it extended from the bank down the hill.

Q. Just how high up on the bank was it?

A. Well, it didn't run up on the bank, as I remember, at all.

Q. It didn't run up on the bank at all?

A. It started at the bank and ran down the hill.

Q. Did you observe another irrigation ditch along that area? A. I did not, no. [15]

Q. At the toe of the canal?

A. You mean at the base of the grade?

Q. That is correct, at the base of the bank of the canal? A. I don't remember any.

Q. You didn't observe it? A. No.

Mr. Veeder: That will be all.

(Testimony of Jerome Sproul.)

Mr. P. J. Gallagher: That is all at this time, Mr. Sproul.

(Witness excused.)

Mr. P. J. Gallagher: Oh, yes, we want leave to recall this witness later on. The purpose of this examination is for foundation on this map.

Call Mr. Bronken. [16]

PAUL BRONKEN

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: What is your name, please?

A. Paul Bronken (spelling), B-r-o-n-k-e-n.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Mr. Bronken, where do you live?

A. Boise, Idaho.

Q. What is your profession?

A. Assistant mining and civil—Assistant for Raymond J. Briggs. It is a consulting engineering firm.

Q. I see; and have you had training in that line?

A. Yes, I have.

Q. Just briefly, what schools did you go to?

A. What schools?

Q. Yes.

(Testimony of Paul Bronken.)

A. I went to Boise Junior College, University of Idaho, Montana School of Mines, Colorado School of Mines, and Columbia University.

Q. I see. And what did you major in, Paul?

A. Mining and geology.

Q. Now, how long have you been practicing?

A. Since July 15th, about, 1946. [17]

Q. I see; and you are associated with whom now?

A. Raymond J. Briggs and Associates.

Q. In Boise? A. In Boise.

Q. Were you called upon, during the months of March or February of this year, Paul, to make some surveys in the area near what we have termed as the break in the Owyhee Canal, in this county?

A. Yes, sir.

Q. Do you have any notes as to what days you were working? A. Yes, sir.

Q. Will you just give those?

A. March 25, March 26, March 29, 1948; April 1, 1948; and May 19, 1948.

Q. I see. Showing you Exhibit No. 82, I will ask you if that is a drawing that you made on the ground in the vicinity that I have just mentioned in my last question?

A. Yes, sir, this is the drawing that I made.

Q. And what does that purport to show? What did you attempt to show on that, Paul?

A. I attempted to show the outline of the wash that was created below the toe of the bank of the canal, and also of the ground and the field that had

(Testimony of Paul Bronken.)

been affected somewhat by seepage water through the bank of the canal.

Q. And what evidence did you find there of seepage water that [18] enabled you to make that drawing?

Mr. Hess: We object to that, your Honor. It is too remote. This is 1948 he is talking about. It is two years after the break.

The Court: Overruled.

Mr. P. J. Gallagher: Go ahead.

A. The evidence I used for determining this area of land affected by seepage was due to the change in cultivation, or, rather, the change in growth of vegetation on this ground. This field evidently at one time had been planted and cultivated as an alfalfa field, and this area here has outlined as best we could determine where the alfalfa had been retarded in growth, from the best we could determine, from excess of water on the ground.

Q. Did you attempt then to make a fair delineation on the map to show what had been affected and what had not been affected?

A. I tried to make a fair delineation, like you say, as to the field which I thought had been cultivated and was now not being used; that is, not being used as such.

Q. That is all, Paul, for that. Now, just while you are on the stand, Paul, there are some other exhibits that I would like to have you identify. The Bailiff will show you what has been marked as Ex-

(Testimony of Paul Bronken.)

hibit No. 80, and I will ask you if you made the drawing shown on Exhibit 80? [19]

A. Yes, I made this drawing.

Q. And was that based upon information that came about the same time, on the same trips to the area? A. Yes, sir.

Q. And is that drawing made to scale, too?

A. Yes, sir.

Q. And what is attempted to be shown on that drawing, Paul?

A. The attempt to be shown on this drawing is some one of these formations,—sandy, pervious formations and blocky, open formations, that we observed in the bank and also at the top of the wash below the canal toe.

Q. What is the relation between the drawings that you have in your hands now, that is, Exhibit 80, and the one that the Court has, which is 82?

A. The relationship is the cross-section through that plat that he has there, which would be up through the middle of the left fork of the wash on that exhibit.

Q. Eighty-two? A. Eighty-two.

Q. Does that exhibit you have in your hand—that is 80, isn't it? A. Eighty.

Q. Does that show the condition that you found upon the ground, particularly as to the location of that pervious structure? [20] A. Yes, sir.

Q. Now, was that made at a time when there was no water in the ditch? A. Yes, sir.

(Testimony of Paul Bronken.)

Q. And could you give us your best judgment as to which day you made the examination of the ditch from which that drawing was made?

A. March 25th or March 26th, one of those two days. Both days we were out and took—I mean we started to work one day and finished the next day, and we probably did a little bit of this work on both days.

Q. Which one of the engineers was with you?

A. Mr. Bouton and Mr. Bronken, Karsten T. Bronken.

Q. That is your brother? A. Yes, sir.

Q. And Mr. Bouton is here and can amplify your testimony on that drawing and what it shows?

A. Yes, sir.

Q. I now show you Exhibit No. 81, Paul, and ask you if that is another drawing that you made from information based upon your visit to the——

A. Yes, sir, that is a drawing that I made.

Q. And what does that purport to show, Paul?

A. This is a section along the axis of the canal, the main North Canal, right above the wash, which we assumed to be [21] where the break was. It purports to show where the sandy formations have been cut off and have somewhat been displaced vertically and otherwise have been eroded out on the horizontal displacement.

Q. And is that drawing made to scale, Paul?

A. Yes, sir, it is made to scale.

Q. And does it show with reasonable accuracy

(Testimony of Paul Bronken.)

the various things that you have mentioned that you have tried to depict upon the map?

A. Yes, sir.

Mr. P. J. Gallagher: That will be all, Paul. Oh, they want to cross-examine you. A. Oh.

Cross-Examination

By Mr. Veeder:

Q. What were the crops that you said were growing on the field that you refer to?

A. Alfalfa.

Q. What were the evidences of that crop?

A. At the time we observed it, it was the lack of growth and kind of brown character of the alfalfa roots.

Q. Now, that was in March? A. Yes.

Q. How does alfalfa usually look along in the spring of the year? [22]

A. How does it usually look?

Q. Yes. How would it differ from the way you described it? Isn't alfalfa usually dead or in a dormant state at that time?

A. Yes, it is in a dormant state, but at that time you could see where—maybe I had better qualify it. The abundancy of the alfalfa crops were not evident in this territory that I have mapped.

Q. Well, couldn't that have occurred from reasons other than—this was two years prior to the time. Couldn't other causes have brought that situation about on alfalfa?

A. I wouldn't say they could not.

Q. What was that, again?

(Testimony of Paul Bronken.)

A. Will you state your question again?

Q. I say, other causes could perhaps have contributed to that condition, isn't that correct?

A. They could contribute to it, I imagine.

Q. You are not sure that the seepage in 1946 could have caused that, are you?

A. Well, I based some assumption on that, according to the growth.

Q. You were not there in '46, were you?

A. No, sir.

Q. You had no opportunity to examine it until almost two years afterwards?

A. Yes, sir.

Q. And yet you think 1946 seepage could have caused that?

A. Well, I think seepage was present there throughout 1946, 1947 and 1948, and there is seepage there now.

Q. It might have been 1947 seepage that could have caused that?

A. Yes, sir.

Q. On Exhibit No. 81 there is a designation, "Section along axis of canal, Station 36 plus 60 to Station 36 plus 800." Would you state what that means?

A. The stationing?

Q. Yes. A. Up——

Mr. P. J. Gallagher: Wait until he sees it. Take a look at the exhibit, Paul.

A. Oh, I am familiar with it. Well, from 36 plus 600—you said "60," I think—to 36 plus 800,—at Mile Post 36 was the basis we used for running the lines up and down this canal. Mile Post 36 happens to be upstream, up the canal, 600 feet from

(Testimony of Paul Bronken.)

this point I have marked on the plat, along the axis of the canal.

Q. (By Mr. Veeder): What mile post was that, would you state? A. Mile Post 36.

Q. Well, Mile Post 36 from what? Mile Post 36,—would you explain what that means?

A. I imagine that is a post that is 36 miles down from the [24] beginning of the canal.

Q. Well, where is the beginning of the canal?

A. I imagine at the reservoir.

Q. Whose mile post was that that you are referring to?

A. I didn't see them put it in, but I imagine the Government put it in, or the contractors.

Q. Wouldn't that, locating it as you have stated, wouldn't that put the mile post well below, about half a mile below the break?

A. Below the break?

Q. Yes. A. No, sir.

Q. What was the type of investigation that you made to ascertain the porous area to which you refer? A. The type of investigation?

Q. Yes.

A. First would be our actual presence on the ground, walking over the ground and looking at these formations, taking deep shots of them with front compass and running levels on them with different horizons where we saw these same formations.

Q. There was no other investigation to ascertain the strike of these porous areas?

(Testimony of Paul Bronken.)

A. You say the strike of the porous areas?

Q. Yes.

A. You can get the dip and the rate of the porous areas, and [25] unless you have the cropping out of them you cannot get the cropping out.

Q. Where did you get the cropping out?

A. In the wash area.

Q. Those outcroppings were at the place where the break occurred? A. Yes.

Q. That is all—would you state how old are you?

A. Twenty-five.

Q. And how long have you been in the practice of geology?

A. How long I have been practicing?

Q. Yes. A. July of '46.

Mr. Veeder: July, '46. That is all.

Redirect Examination

By Mr. P. J. Gallagher:

Q. One other question, Paul, before you leave the stand: You spoke about the outcropping of this porous area being in the bed of the canal. Does the exhibit that delineates that—which is it? Eighty-one? A. Both 80 and 81 do.

Q. Well, does 80 show about the proper location of that porous structure in the canal bed and on the opposite bank, the upper bank? A. Yes, sir.

Q. Were those photographs made showing the presence of that porous area in the bank? Is that shown on some other exhibits? A. Yes, sir.

Q. And that was made while you were there, too? A. Yes, sir.

(Testimony of Paul Bronken.)

Q. I think that is all—oh, just a second. Now, was the outcropping that showed in the bank of the canal, the upper bank,—is that the same outcropping that is shown in this wash down below the bank?

A. As near as I could determine by hand-sampling and looking at the material, it was the same material.

Q. Did you take any observations or surveys to show the pitch and the similarity in the grade?

A. Yes, sir.

Q. What was the result of that, as to whether or not that outcropping ran back under the canal bank? A. You mean whether the——

Q. Whether the outcropping that is shown down in the wash ran back under the bank?

A. Yes, sir.

Q. And it was obvious and exposed in the canal bank? A. Yes, sir.

Mr. P. J. Gallagher: That is all, Paul. That is all.

(Witness excused.) [27]

Mr. P. J. Gallagher: I would like to offer in evidence No. 82, the one that shows that area.

Mr. Veeder: We object to that exhibit on the ground that it does not show the real condition of the canal and that it is irrelevant and immaterial to this case.

Mr. P. J. Gallagher: It is offered, your Honor, for the purpose of assisting the other witnesses to—or permitting them to say where in this area they

saw certain conditions. It is not offered to prove presence of leakage at all.

The Court: Objection overruled. The exhibit is admitted.

The Clerk: Eighty-two received.

(The profile map referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 82.)

Mr. Veeder: Has there been a ruling on the objection, your Honor?

The Court: Yes, I ruled just as definitely as I knew how. I overruled it and admitted the exhibit in evidence.

Mr. P. J. Gallagher: Would you put that on the board, please. We will call Mr. Matherly, Theodore Matherly. [28]

THEODORE MATHERLY

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Is Theodore Matherly your true name?

A. Yes, sir.

The Clerk: M-a-t-t-e-r-l-y?

A. M-a-t-h-e-r-l-y.

(The witness was thereupon duly sworn.)

(Testimony of Theodore Matherly.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Your name is Theodore Matherly?

A. Yes, sir.

Q. Where do you live, Mr. Matherly?

A. Ontario, Oregon, Route 1.

Q. That is on a farm? Your home is on a farm?

A. Yes, sir, on a farm.

Q. And where is it in relation to the break that occurred in the Owyhee Canal in July of 1946? Where is your farm in relation to that break?

A. Right under it, east of the break.

Q. About how far? A. Just about a mile.

Q. Your farm would be about a mile east of the break? A. A little east and a little south.

Q. And is your farm located where it caught the floodwaters [29] from the break in the canal?

A. Yes, it did, about three acres of it.

Q. About three acres of your farm was covered with the water?

A. Of my crop land, and about three acres of pasture.

Q. I see. Do you remember the occasion of the break? Do you remember about the break happening? A. Yes.

Q. Now, how long had you lived there before this break occurred?

A. Oh, about eight years.

Q. By the way, you are not interested in this

(Testimony of Theodore Matherly.)

lawsuit? That is, I mean to say, you have no claim filed here? A. No, I haven't.

Q. Did you know the man who owned the farm where the break occurred? A. Yes, sir.

Q. What is his name? A. Ben Shaw.

Q. Ben Shaw. Had you ever visited on that place or worked on that place prior to the time of the break, Mr. Matherly?

A. Yes, sir, I did some plowing for him.

Q. And what years would you say that you plowed that for—did you plow it for Mr. Shaw?

A. Yes, I plowed some for Mr. Shaw. I just don't remember what year that was, to tell the truth. [30]

Q. Well, was it the years just prior to the time that the ditch broke?

A. Yes, about—I believe it was about the year before the ditch broke.

Q. And, assuming that the ditch broke in '46, that would put it back to '45- A. Yes.

Mr. Hess: We object to these questions assuming what the answer should be, leading and suggestive.

The Court: Yes, that is a defect that counsel has to observe in this instance. It doesn't make any difference in some of them, but watch the character of your examination.

Mr. P. J. Gallagher: Yes, I will try to.

Q. Among other areas that you plowed, Mr. Matherly, did you plow on any land that laid up close to the ditch?

(Testimony of Theodore Matherly.)

A. Well, not only that one field for Mr. Shaw.

Q. And where was the field that you actually did plow in relation to the bank of the ditch?

A. It was right under the ditch, kind of close to that draw that runs down through there.

Q. Can you see that map that is nearest to you, Exhibit No. 82, that is on the billboard there? Does that drawing, in your mind, show about the location of the land under the ditch? A. Yes, it does.

Q. Now, step over there and show to the Court about where you [31] were plowing, Mr. Matherly.

A. This shows here the draw that the water rushed down (indicating).

Q. Yes.

A. Right in this area, right in here (indicating). We was plowing right down through this draw, like this, and my outfit was mired down right in there (indicating).

Q. Now, will you take this pencil and just mark the word "Plowing" at about the spot that you say that you were plowing in there.

A. Well, I don't know that I could get that right on the spot or not.

Q. Oh, no,—just as near as you can.

A. But I could get somewheres close, I think. (Witness here placed a mark on said exhibit.)

Q. Will you put your initials after that, "T." or "T.M."?

(The witness thereupon initialed the map.)

Q. What time of the year was that?

A. That was in the spring, in March.

(Testimony of Theodore Matherly.)

Q. Was that before they were irrigating?

A. Yes; he hadn't been irrigating this field at the time I was plowing it.

Q. There was no water being used from the ditch on that land that you plowed?

A. No, not at that time. [32]

Q. That is what I mean. And what was the nature of your equipment you were trying to plow with?

A. I had an N Farmall, Rolo plow.

Q. What kind of plow?

A. Thirty-three horse.

Q. Tractor? A. Tractor.

Q. And what do you say, now, about whether you were able to plow on that or not?

A. No, we had to release on that. We couldn't plow it. We had to go around it.

Q. Why?

A. Too soft; couldn't go through it.

Q. Could you tell where the water was coming from, from the south of that land?

Mr. Hess: Just a minute. I think that engages in the realm of speculation.

The Court: Yes. If he knows he can tell. If he had seen any evidences, he can tell what the evidences were.

Q. (By Mr. P. J. Gallagher): If you know, Mr. Matherly, you can answer the question, if you know where the water came from.

A. Well, I presume it was coming from the seep from the ditch.

The Court: That answer is stricken.

(Testimony of Theodore Matherly.)

Q. (By Mr. P. J. Gallagher): Had you ever seen water seeping out of that ditch there? [33]

A. Yes, I seen water coming down that little draw there.

Q. In the immediate vicinity of where you were plowing there?

A. Well, it was pretty close to where we were plowing.

Q. How long were you attempting to get that work done in there for Mr. Shaw?

A. You mean how many hours was I——

Q. Yes, hours or days, or whatever it was?

A. Well, I was only up there a couple of days, because I have got a pretty big outfit and——

Q. Did you examine the area from where you were attempting to plow on up to the bank of the ditch, as to its being wet or not?

A. No, I did not.

Q. How far away from the bank of the ditch were you, I mean the lower embankment of the ditch, when you discovered this wet area?

A. Oh, a couple of hundred yards.

Q. How much of that whole area delineated on that map—there is supposed to be 4.30 acres—how much of that would you say was too wet to farm there in March of 1945?

A. Well, I really couldn't answer that question. It seemed to be in spots. We would hit a soft spot and I would get stuck and we would pull around a little way and then we would hit another one. There

(Testimony of Theodore Matherly.)

seemed to be several of those spots, and where we would hit them we would just leave them. [34]

Q. And how many spots would you say that you encountered there on that occasion that were too wet to plow? A. Oh, four or five.

Q. Have you been back since that time, any other years, Mr. Matherly?

A. No, not in there I haven't.

Q. Did you observe any water, any surface water, running in draws or canyons—not canyons—or ditches at all that spring there?

Mr. Veeder: I object. That is a leading question.

Mr. P. J. Gallagher: It may be leading.

Mr. Hess: It is immaterial, incompetent and immaterial.

The Court: No, the objection is overruled. He asked him if he saw any water. If he didn't see any he can say so.

Q. (By Mr. P. J. Gallagher): Did you understand my question, Mr. Matherly?

A. What was it, again?

The Court: Read the question.

Mr. Veeder: To what years do you refer?

Mr. P. J. Gallagher: '45.

The Court: You may cross-examine him about that. Go ahead. Let's get along with this.

Mr. P. J. Gallagher: Will you read the question to him.

(Testimony of Theodore Matherly.)

(Pending question read.)

A. Yes, I saw some water running down the draw. [35]

Q. Where were those particular draws, Mr. Matherly?

A. Well, that one draw there where I was plowing, and one north of that.

Q. And do you know what the source of that water was, where it came from?

A. I presume it was seeping from the ditch.

The Court: That is stricken.

Q. (By Mr. P. J. Gallagher): That is stricken out when you say "presume." How close did you see the water?

A. Well, I wasn't right up to the bank. I was pretty close to it.

Q. Now, did you see any other sources of water around there except what might have been held within the ditch?

A. Those are the only two places that I knew at that time.

Q. Did those two places seem to be natural springs or seepage?

A. Well, they seemed to be natural. That is all that I seen that summer.

Q. Were there springs in there before the ditch was dug at all?

A. No, there was not.

Mr. P. J. Gallagher: That is all.

(Testimony of Theodore Matherly.)

Cross-Examination

By Mr. Hess:

Q. How long have you lived in that vicinity,—that is, the place where you have your ranch? [36]

A. Oh, about eight years.

Q. About eight years?

A. Seven or eight years, something like that.

Q. When was this canal built?

A. I don't know. I couldn't give you the date on that.

Q. Where did you come from when you first moved to your ranch out there?

A. Well, I had been living around Nyssa and Ontario for the last twenty-five years.

Q. But you had no property over in that area?

A. Not at that time I didn't.

Q. Never had any property there at all. There is a ditch, a lateral ditch, a header or a lateral ditch, that runs underneath the lower bank of the canal along in this area of this Exhibit 82, or where this break occurred, rather,—There is a lateral ditch that runs along there, is there not, that irrigates the land down below that ditch at that point and in that vicinity? A. I don't know.

Q. And it was there and was used for that purpose in the year 1946, isn't that a fact?

A. I don't know.

Q. What about '44 or '45 or '43, or whenever you have plowed in there,—Was there a lateral or header ditch in there?

(Testimony of Theodore Matherly.)

A. Well, there could have been, but I didn't see it. [37]

Q. You didn't see that ditch at all?

A. No, sir.

Q. There could have been a ditch there?

A. There could have been.

Q. Where that water could have come from to have made the area damp where you were plowing?

A. Well, this man had never irrigated that field that year yet.

Q. You say he hadn't irrigated it that year yet?

A. No.

Q. This was in March, you say?

A. Along the last of March.

Q. Along the last of March. Do you know what time of year the water was turned in that North Canal that spring?

A. No, I couldn't tell you the dates.

Q. There was no water in that North Canal at that time when you plowed, was there?

A. Well, now, I couldn't say whether there was or not.

Q. You don't know whether there had been any water in that canal at all during that year up to the time you did that plowing?

A. Yes, I know there was water in there that year all right.

Q. But not prior to the time when you did the plowing, when you saw these wet spots?

A. Well, there probably wasn't any water in that ditch at [38] the time I did the plowing.

Q. Did you then or shortly thereafter observe

(Testimony of Theodore Matherly.)

Q. Yes; and hadn't been at any time during that year? That is correct, is it not? It wasn't irrigating season yet, was it?

A. Well, now, I just couldn't answer that. I don't know.

Q. But you saw no water in the ditch whatsoever, did you?

A. I wasn't up on the ditch bank.

Q. And how far from the ditch bank was this that you did this plowing?

A. Oh, probably three or four hundred yards.

Q. And in that vicinity the land slopes?

A. Yes, it is quite steep.

Q. Yes, and all through that territory, clear on down; that is correct; is it not?

A. That is correct.

Q. Quite a slope. How big were the soft spots that you talk about?

A. Well, some of them was quite big.

Q. How big?

A. I didn't measure them, but I would get my outfit stuck, anyway.

Q. Well, would you say they were two or four feet across them, or——

A. Well, I would say in there in the field I would probably have to skip probably an acre and a half of ground, just in [39] spots.

Q. How big was that field?

A. Well, now, I couldn't answer that question. I don't know.

(Testimony of Theodore Matherly.)

Q. Could you plow between those spots, or did you plow between those?

A. No, we just would plow up to them and then turn around and go back.

Q. Well, you plowed that area around in there, didn't you? A. Well, I plowed what I could.

Q. Do you know what was planted in there after you plowed it? A. No, I don't.

Q. Were there any dry spots between the header ditch or between the toe of the canal there and down where you were plowing?

A. There was a header ditch, did you say?

Q. Yes, a header ditch, it was a header ditch there, or a gate.

A. I think there was a ditch, a small ditch, run down the south side of the end of the field, as I remember it, because I would get my tractor wheels in it once in a while, but the other side I don't know.

Q. The south side of the field, would you designate that, where you mean?

A. Well, the small ditch I speak of,—there is a fence line down through here, I believe,—it came down through a tile, a [40] small ditch, down in there (indicating).

Q. Would you mark that on the map?

A. But as far as up here (indicating), I don't know. That is a pretty big map to draw a ditch on, but it was along in here, someplace like that (indicating).

(Testimony of Theodore Matherly.)

Q. Well, where did it come from? Where did that ditch come from? A. I don't know.

Q. Mark it as a ditch. Mark it in there and put your initial on it as a ditch that was along there.

(The witness here placed a mark on the map and initialed same.)

Q. Now, will you locate the North Canal on that map.

A. Well, it is right up in here someplace (indicating).

Q. All right, mark it there, will you, where the North Canal is, according to your observation, on the map.

Mr. P. J. Gallagher: You mean the North Canal, now, the main canal?

Mr. Hess: That is the main canal, yes.

A. You mean the main canal?

Q. Yes; mark what you would regard the main canal.

A. Is this the north side of this map (indicating)?

Q. You are the witness.

Mr. P. J. Gallagher: That is the west side.

A. That is the west side? Well, I am turned around, then, [41] on the map.

Q. (By Mr. Hess): All right, then, did you think the ditch was in a different place? This lateral or header ditch, where would you place it,

(Testimony of Theodore Matherly.)

now that you have your information from Mr. Gallagher?

Mr. P. J. Gallagher: No, just—I am sorry you are finicky about it, but I think the witness is confused. Now I wish you would first locate what you claim to be the main canal.

Q. (By Mr. Hess): Now, which direction does that ditch run there, now, that you have marked what you have said to be a ditch? Does that represent that line?

A. What? The main ditch?

Q. No, the header ditch.

A. The little ditch that he irrigates out of?

Q. Yes.

A. Well, this one here that I am referring to would run south.

Q. Would run south? A. Yes.

Q. And he irrigates from that, does he?

A. I don't know what he irrigates. I don't know whether he irrigates this piece of ground from that ditch or some land down below.

Q. Yes, he could irrigate that land from it, could he not, and some land down below? [42]

A. I don't know what he would irrigate from it.

Q. What is that writing that you put up there?

A. That is the North Canal.

Q. Now, where did you do your plowing?

A. Right in here (indicating).

Q. Right where you first wrote it in, is that right?

(Testimony of Theodore Matherly.)

A. I don't know whether that is the exact spot or not, but it was right in there (indicating).

Q. And how far was that spot from the North Canal?

A. Well, there's buildings up in there. I don't know whether it run clear down to the buildings, or just what that is.

Q. Could you make an estimate?

A. No, I couldn't.

Q. A hundred feet, two hundred feet, or three hundred feet?

A. Well, it is farther than that, but I don't know how far.

Q. Could those soft spots come from rain or snow?

A. Well, I wouldn't think on that steep ground that snow water or rain water would stand there at that spot.

Q. And of course you don't know whether there had been any water whatsoever in the North Canal that year up to that time or not?

A. No, I don't.

Mr. Hess: That is all.

Mr. P. J. Gallagher: That is all.

(Witness excused.) [43]

Mr. P. J. Gallagher: Call Mr. Hawkins.

ARTHUR C. HAWKINS

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Will you state your name, please?

A. Arthur C. Hawkins.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live, Mr. Hawkins?

A. I now live out toward Adrian, west of the northernmost corner.

Q. In Malheur County? A. Yes.

Q. Are you familiar with the area around the break in the North Canal that occurred in 1946? Were you familiar with that territory surrounding that break? A. Yes, some.

Q. Where were you staying or living at the time the break occurred?

A. I was living on the Ben Shaw farm, that farm where the break occurred.

Q. And how far from the break was the house located that you were living in? [44]

A. Oh, I would judge a quarter of a mile, probably a little better.

Q. Were you there at any time before the break, so as to observe the nature of the soil around below the break?

A. Yes, I was there. I noticed—it was quite

(Testimony of Arthur C. Hawkins.)

noticeable, the alkaline formation all underneath the canal there.

Q. Now, we have drawn a little map and call it Exhibit No. 82. That is pinned up on that black-board there. I wish you would just take a look at it and see if you recognize that area?

A. Well, I am kind of dumb, only on maps that I draw myself.

The Court: Well, now, since there has been some question raised about this, wouldn't it be better for a map to show what the directions are?

Mr. P. J. Gallagher: Yes, I think it would, your Honor. It would make it easier for the witnesses to follow, I think.

The Court: It would make it easier for me to follow.

Mr. P. J. Gallagher: Will you just take a chair and I will call the engineer back.

Mr. P. J. Gallagher (To Mr. Paul Bronken): Will you indicate on the map, Paul, the directions on the map.

Mr. Paul Bronken: The direction of flow is in that direction (indicating).

Mr. P. J. Gallagher: What direction is it? Straight north, or what? [45]

Mr. Paul Bronken: For all practical purposes it would be north.

Mr. P. J. Gallagher: Now, while you are up there, will you draw the main canal on there as you observed it.

Mr. Paul Bronken: This is on the map here.

(Testimony of Arthur C. Hawkins.)

Mr. P. J. Gallagher: Oh, I see. Now, will you indicate the other points of the compass also, Mr. Bronken.

(Mr. Paul Bronken here marked Plaintiffs' Exhibit 82 as directed by counsel for plaintiffs).

Q. (By Mr. P. J. Gallagher): Now, Mr. Hawkins, will you take another look at it and orient yourself by what is marked up there as the North Canal, where the arrow is on the top of the map?

A. Well, to me that there would be west, the way that piece of land lays.

Q. No, unfortunately, that is——

A. But, as I just said, I am mixed up on this map. I can't quite determine here north——

Q. The ditch, Archie, is on the upper side of the map there.

A. Yes, up here (indicating).

Q. Yes; and that is on the west side of the farm?

A. Yes, that is right.

Q. Now, then, with that information, with that in mind, where is the area that you noticed as wet? [46]

A. Well, this is the canal up here (indicating). Immediately underneath this canal for, oh, for quite an area here (indicating).

Q. How close up to the bank of the canal?

A. Well, underneath the canal there is a lateral or feed ditch that runs down and runs south, and underneath that feed ditch is where it was wet. I happened to plow up there, too, that same—in '46,

(Testimony of Arthur C. Hawkins.)

I think it was. I had a crawler tractor and I plowed up there and I got stuck also.

Q. How big is that feed ditch and what is its purpose?

A. It is to carry water to the lower end of the place and also to water that land underneath the map (sic).

Q. Is that feed ditch to pick up any water that may have leaked from the canal?

Mr. Hess: We object to that as assuming and speculating.

Mr. P. J. Gallagher: I will withdraw that.

The Court: If he can answer, that is all right.

Q. (By Mr. P. J. Gallagher): Do you know whether or not any water that seeps from that main canal would be picked up by that feed ditch?

A. Ordinarily it would not.

Q. Now, how far from the bank of the canal, the lower bank of the canal, were you attempting to plow?

A. Well, I plowed that piece of land from the house up to the—as far as I could up to the canal, up to, I would say, [47] about three or four hundred feet, when the canal was dry. I had my trouble below the canal, east of the canal.

Q. On what area of ground there did you have trouble with your plow?

A. Well, approximately this area that lays east of this ditch, this feed ditch, that runs down through the place.

Q. Would it be an acre or two acres?

(Testimony of Arthur C. Hawkins.)

A. Well, there was more than that, I think.

Q. More than an acre?

A. Yes, I imagine there was. I would imagine there was three acres, I would say.

Q. What time in the year were you trying to plow?

A. Well, it was a little bit late that year. I don't just remember the date.

Q. Do you remember whether or not the water was in the canal?

A. No, it hadn't been in the canal.

Q. It was before the irrigation season started?

A. Yes, that is right.

Q. And how wet was it in relation to whether you could plow or not?

A. Well, I had a crawler tractor and of course that wouldn't get stuck, but one wheel of my plow would get down so I would get stalled. It would hit the bottom of the furrow and drop down.

Q. Was it muddy? [48]

A. Yes, it was very muddy.

Q. Were you able to plow some of that area or not in there?

A. I couldn't plow some of that next to the ditch. It was too muddy.

Q. That, you think, was in the spring of 1946?

Mr. Hess: We object to this question as assuming and suggesting, your Honor.

The Court: I think that was suggestive. What year was it?

A. '46.

(Testimony of Arthur C. Hawkins.)

Q. (By Mr. P. J. Gallagher): '46. Then were you back there at all after that and observe them cutting any hay crops off?

A. Yes, they had trouble getting the hay crop off.

Q. What do you know about that, Mr. Hawkins?

A. Well, I know that they had to carry it off with pitchforks instead of getting their machinery on there.

Q. Were you there when they were attempting to hay? A. Yes.

Q. And who was trying to farm it that year?

A. Mr. Shaw was farming it himself.

Q. And were you helping him there?

A. No; I was living on the farm, and Mr. Turner was working for me, and also my son, and he used them to help.

Q. Do you know how he cut the hay for that area? A. A team of horses. [49]

Q. And then these other boys were trying to help him get the hay off? A. That is right.

Q. What have you to say about the area of the land laying up near the ditch that may have been—
(At this point the electric lights in the courtroom were extinguished.)

The Court: Court will recess.

(Short recess.)

Mr. P. J. Gallagher: Mr. Reporter, will you read the last question and answer, please.

(The last question and the answer thereto

(Testimony of Arthur C. Hawkins.)

and the uncompleted question following said answer were thereupon read by the Reporter.)

Q. (By Mr. P. J. Gallagher): What have you to say about the area of the land lying up near the ditch having been waterlogged or wet?

The Court: Well, Mr. Gallagher, I am going to strike that question. You have a way of suggesting to the witness what you would like to have him testify to.

Mr. P. J. Gallagher: Yes, I am sorry about that, your Honor.

Q. Did you observe the land that lay up under the canal on that Shaw ranch there, Hr. Hawkins, as to whether there was any water or seepage there?

A. There was seepage, there, yes. [50]

Q. Now, that was what year that you are now testifying to, Mr. Hawkins?

A. Well, we are talking about the year '46.

Q. The year '46.

A. The year that they were haying. I was mistaken in the year that I did that plowing. That was in '45. I would like to correct that.

Q. You want to correct your statement as to the year that you did the plowing?

A. As to the year I did the plowing, yes. I was living on the ranch adjoining in '45 and that is the year I did the plowing.

Q. And could you tell again—I have forgotten the time of the year that you did the plowing. Was that before the start of the irrigating season or after they had begun irrigating?

(Testimony of Arthur C. Hawkins.)

A. Yes, it was getting quite dry that spring. It was before irrigation.

Q. Now, were you there in that vicinity at the time the break occurred, Mr. Hawkins?

A. Yes.

Q. As I understand your testimony, you were living on this Shaw place? A. Yes.

Q. In the Shaw house?

A. That is right. [51]

Q. Which break did you observe, the first or the second break?

A. We had been up to the Payette Lakes and we observed the break when we were coming home, we could see the water coming over the banks and down the gulch, we could see the people down there.

Q. Did you go up there immediately, up to it?

A. That is right.

Q. How many Caterpillars or implements were they using to repair the breaks when you got there?

A. Well, at first there wasn't none there yet. They started that night, I believe. That night of the break I believe the Government had their machine in there, some time in the night.

Q. Did you observe a Caterpillar bogged down or stuck in the mud there at that time?

A. Not at that particular time. It was the second break.

Q. How many days afterwards?

A. I couldn't say exactly.

Q. But it was on the occasion of the second break? A. Yes.

(Testimony of Arthur C. Hawkins.)

Q. And where was the Caterpillar, what area of the tract shown on Exhibit No. 82, if that is where the Caterpillar bogged down? What part of that tract was the Caterpillar bogged down on?

A. It was on the south side of the wash, right east, underneath [52] the break.

Q. Do you think you know enough about that map now so you could go up there and write the word "Caterpillar" or "Cat"?

A. Well, if you would let me mark it up I could, yes.

Q. Beg your pardon?

A. I say if you would let me mark the map up I could, yes.

Q. Don't mark it up any more than you have to, but write out the word "Cat." Now, for your information there, the engineer has marked—

Mr. Hess: Just a minute. The map shows for itself.

The Court: Well, yes. If he doesn't understand the map, then he can't do it.

Q. (By Mr. P. J. Gallagher): Do you understand where the ditch is located on the map, Mr. Hawkins?

A. Yes; this is the North ditch. This is the canal. This is the canal right here (indicating). Say, for instance, the break was right here (indicating), —I don't know whether it was; it could be over here or could be there (indicating)—but say, for instance, this was the break, the wash came down through the field this way. Right here the Cater-

(Testimony of Arthur C. Hawkins.)

pillar was stuck, right underneath that tree, just underneath that tree that stands there yet, I guess—I don't know.

Q. Will you write the word "Cat" there?

(The witness here marked on Plaintiffs' Exhibit 82 as directed by counsel.) [53]

Q. Now, was that stuck in the location where the land had been wetted up from the flood or otherwise?

Mr. Hess: Well, I object to that, if he didn't see it, what caused it being wet.

The Court: Objection sustained.

Mr. P. J. Gallagher: Yes, I know it was leading.

Q. Sit down again, Mr. Hawkins. Was the Caterpillar stuck in any area that had been wet by water running away from the canal out of the break?

A. I would say it had.

Q. You would think that the land that the Caterpillar was stuck in had been wet by the water coming out of the break? A. I think so.

Q. How far south of that wash was the Caterpillar stuck?

The Court: That testimony can't remain in the record unless he tells what the conditions were, what he observed, but you are asking conditions that made him think that.

Mr. P. J. Gallagher: How far back do you want to strike it out?

The Court: Well, if you can further qualify him, let him tell what the conditions were around the Caterpillar at the time it was stuck.

Q. (By Mr. P. J. Gallagher): Mr. Hawkins,

(Testimony of Arthur C. Hawkins.)

from the observations that you made there, could you tell how far south the water had made a wash there that ran out of the canal as a result of [54] the break? Do you understand that?

A. Not exactly, no, I don't.

Q. You say you don't understand it?

A. I don't understand it.

Q. Could you see the result of the water running from the canal? Was there a ditch or wash cut by that water?

A. This particular place where the cat was stuck, the water at the beginning of the wash had flowed over the bank and wet this ground, and this Caterpillar was stuck back—Well, it was a good ten feet from the bank of the wash, where the water had went down the wash, over the front end of the cat—probably be further; I don't know. I didn't just particularly pay any attention to it. The only thing that I paid attention to was the cat was stuck there, and after we had pulled the thing out I said to the boys——

Mr. Hess: Object to what he said.

The Court: Yes. Don't tell what you said.

A. I see. Well, this thing, anyway, was stuck in the mud.

Q. (By Mr. P. J. Gallagher): How did you get the cat out?

A. We took Mr. Clowers' International truck and pulled it out with a winch, with the help of Mr. Terhune running his Caterpillar.

(Testimony of Arthur C. Hawkins.)

Q. And that was, as I recall, about ten feet south of the wash?

A. From the side of the wash. [55]

Q. And which way did you pull it out, what direction?

A. We just pulled it south from where it was stuck, right back south.

Q. Then it would get going under its own power after that? A. Yes, it did.

Q. Now, when you got down there after the first break was the water still running down this wash? Do you know what time of day it was when you got down there?

A. Between five and six o'clock, I think it was. I couldn't say for sure the exact hour.

Q. Well, how long did you stay in the immediate vicinity of the break?

A. Well, we stayed there until almost dark.

Q. What were they doing there towards repairing it?

A. Well, they hadn't done nothing yet at the time of the first break.

Q. Did you stay there until they repaired the first break, then? A. No, I was working.

Q. Did you go back there again after they had the break partially repaired? A. Yes.

Q. I am speaking now of the second break. Where were you the evening when the second break occurred?

A. We had just arrived home from our work.

(Testimony of Arthur C. Hawkins.)

Q. By "home" you mean the Shaw house?

A. Yes, that is right.

Q. Just tell the Court, in your own language, about what you observed about the water and what happened at the time the second break occurred, giving the hours of the day, as near as you can, Mr. Hawkins?

A. Well, we had just arrived home, between six and seven o'clock, or I would say about—I wouldn't say exactly, but we had come home from our work and I imagine it was between six and seven o'clock, we were just starting out, and we heard a noise, looked out, and someone said, "There water comes over the canal again," and we started to run; we run up there as fast as we could.

Q. What was the condition that you found, when you got there, as to the water?

A. The water was running full length over the fill that they had put in.

Q. And over how long an area?

A. Approximately fifty feet, fifty or sixty feet.

Q. In other words, they had got fifty or sixty feet of canal built and the water was running over that bank?

A. It was all on a level, as near as I remember.

Q. You mean the water and the bank?

A. Yes, and the water was coming directly over the bank.

Q. How high, if you know, was the new bank built up to, or [57] could you tell?

A. Couldn't tell exactly.

(Testimony of Arthur C. Hawkins.)

Q. Well, how long did you stay there?

A. Oh, approximately an hour and a half.

Q. And did the water continue to run over the new fill while you were there?

A. That is right.

Q. Was it still running over when you left?

A. Yes.

Q. And about what hour would you say that you left there that evening? A. Nearly dark.

Q. When did you learn that the ditch broke again? When did you first learn that?

A. The second time?

Q. Yes, the second time?

A. Well, that was between six and seven o'clock when we had arrived home and saw it coming over the bank.

Q. Oh. But it was still running over——

A. It was still running over yet at dark.

Q. Do you know when the bank cut out entirely?

A. No, I don't.

Q. Did you go back there the next morning?

A. Yes.

Q. And what did you find then as to the condition of the bank, [58] Mr. Hawkins?

A. It had all gone again.

Q. Was the water shut off or still running out of the hole in the canal?

A. It was running some. Not very much. Just a small trickle of stream.

Q. And running from which direction, the south or the north?

(Testimony of Arthur C. Hawkins.)

A. Running from the south.

Q. What hour would you say you were back the next morning?

A. Before we went to work. I don't remember. It was pretty early.

Q. How wide a gap was there in the bank of the canal there after it broke the second time, Mr. Hawkins?

A. Well, I couldn't just exactly say.

Q. And what do you say as to the location of that gap and break in connection with the gap made by the first break?

A. I would say it was identically the same place.

Q. You were doing some work in some other part of the country?

A. That is right, land leveling.

Q. Did you stay around and assist at all, or were you employed to do any of the work in the repair of the ditch? A. No, none whatever.

Q. Mr. Hawkins, do you remember whom you saw, if anyone, at the ditch break when you first saw the water running over that evening? Who was there? [59]

A. I saw Mr. Terhune and Mr. Clowers and an engineer that was there; I don't know what his name was.

Q. Mr. Terhune was the man that had the cat stuck? A. Yes, he had the D-8.

Q. And Mr. Clowers, was he another cat man?

A. Yes, he was another man that had a cat.

(Testimony of Arthur C. Hawkins.)

Mr. P. J. Gallagher: Grant, will you stand up?

(A gentleman in the audience arose to his feet.)

Q. Do you recognize this young man as being the engineer?

A. Well, it seems like his face is familiar.

Q. Were there any other people there that you remember of? A. That is all.

Q. Did you see the canal above the break, so as to determine or estimate the amount of water that was flowing in the canal?

A. Well, there was a big head of water.

Mr. Veeder: I object, your Honor. There is no specification as to the time when water was flowing in the canal, nor has he been qualified to testify as an expert as to what water would be flowing in the canal.

The Court: Well, he is asking for his observation.

Mr. Veeder: He hasn't specified the time.

The Court: Well, I know, but you can cross-examine about that if you want to know about that further.

Q. (By Mr. P. J. Gallagher): I am speaking of the time, of the occasion, when you went up after the first break and you [60] saw the water coming over, just prior to the first break——

The Court: Just prior to when?

Mr. P. J. Gallagher: Just prior to the second break.

The Court: That was not what you said first.

(Testimony of Arthur C. Hawkins.)

Mr. P. J. Gallagher: No, I understand.

Q. Is it quite clear in your mind as to what time I am asking you about?

A. Well, I wasn't up there before the break. It was after the break when I was there. It had to be between seven or eight, and I stated that I was there from between six and seven and I stayed there until about eight, or until about dark, and there was quite a considerable head of water coming.

Q. Had you seen that ditch when it was running normally full? A. Yes.

Q. What have you to say as to the amount of water that was coming when the break opened, as to a normal ditch flow?

A. Well, my judgment would be that it was half full.

Q. And it was running out over the bank?

A. That is right.

Q. How deep was it running over the bank?

A. I would say seven or eight inches, probably a foot, because when he drove his cat across there it was quite a ways up on the tracks, and the load of dirt had no effect on it at all, so it had to be a pretty big stream.

Q. Who was driving the cats across there? [61]

A. Mr. Clowers. He was driving the only cat that was operating there.

Q. And where was the other cat?

A. The other cat was stuck.

(Testimony of Arthur C. Hawkins.)

Q. You spoke about Mr. Clowers operating his cat there. How did he operate over the area that the water was running over the bank? Did he run it clear across that area?

A. He did. After they couldn't head it off there, why, he was 'dozing from the—He was 'dozing on the north side of the break. It seemed to have no effect on the flow of water, so then he crossed over in the water, on top of the bank, and went up and tried to 'doze in the cofferdam that had been taken out by that heavy stream of water.

Q. Where was this little cofferdam located with relation to the break? Was it above or below?

A. Above the break.

Q. And did you say that he went on up then and tried to head off the water——

A. Tried to head off the water then by 'dozing in the cofferdam.

Q. And was he able to stop the flow of water then by doing that? A. None whatever.

Q. You left there about dark?

A. Some time about dark; I don't just remember. [62]

Q. And I understand from your testimony that the water was flowing over the bank at the time you left? A. That is right.

Mr. P. J. Gallagher: I think that is all from this witness.

(Testimony of Arthur C. Hawkins.)

Cross-Examination

By Mr. Hess:

Q. Where did you say you now live, Mr. Hawkins?

A. I live out on the Adrian—on the road to the dam, west of Langdon's Corner.

Q. How long have you lived out there?

A. I lived there a year last December.

Q. You say you were living at one of the Shaw houses, about a mile from where this break occurred?

A. About a quarter of a mile.

Q. About a quarter of a mile from where the break occurred. During what year?

A. The year of '46.

Q. Where were you living during the year '45?

A. I was living adjoining Mr. Shaw's place on the north.

Q. How far from the place of the break?

A. Well, it was across 160 acres—160 acres and 80 acres, so that would be about a mile and—about a mile, I guess.

Q. About a mile?

A. Approximately. [63]

Q. All right. Now, would you step down, just a minute, and place this ditch that you spoke about? That was down near the toe of the south bank of the North Canal, across this wet place that you speak about. Will you draw that ditch, that lateral, in the direction in which it flows.

A. Well, supposing that this is going north,

(Testimony of Arthur C. Hawkins.)

this is the canal here—This little lateral comes down, heads up here, and flows south (indicating).

Q. Will you mark it, please. Will you mark that about the way it goes. Just draw it right down through there.

A. (Witness here marked upon Plaintiffs' Exhibit 82). That is as near as I can remember. I may have it off a little.

Q. I see. And would you mark that lateral ditch, please, lateral ditch right along your line.

(The witness here placed a further mark on said exhibit.)

Q. All right. Now, then, how large a ditch is that, Mr. Hawkins?

A. Well, it isn't a very large ditch. It is a rather small ditch, probably two feet across it, a foot and a half, or three feet—just a small irrigation ditch for a small stream.

Q. I see. Then you may be seated. And how far would you say that is from the lower edge of the south bank of the North Canal?

A. Let me see—Let me get that question, please.

Mr. Hess: Would you read it, Mr. Reporter, please.

The Court: Read it.

(Pending question read.)

Q. (By Mr. Hess): That is the east bank, rather, the east bank of the North Canal—That is the bank downstream.

(Testimony of Arthur C. Hawkins.)

A. Oh, the lower ditch bank from the other bank?

Q. Yes. A. It is very near up against it.

Q. Now, then, from your testimony, you say you did some plowing in 1945 before there was any water in either one of those ditches?

A. That is right.

Q. Either the lateral or the North Canal. And how far was that plowing easterly from the lateral ditch?

A. I would say some two or three hundred feet, three or four hundred feet, down the canal, down the bank from the bottom of this ditch, where I quit plowing.

Q. Was the land farmed clear up to this lateral ditch, or did it start in someplace below it?

A. He started it from where I quit plowing.

Q. That isn't the question I asked.

A. Pardon me.

Q. I asked the question if the land was farmed immediately below the commencement and below the lateral ditch.

The Court: Well, I don't understand that myself. [65]

Mr. Hess: Well, I will ask it that way, then, your Honor. I will ask the question the way I am asking it now:

Q. Was this land farmed clear up to the lateral ditch? A. Most of it, yes.

(Testimony of Arthur C. Hawkins.)

Q. How far up to the lateral ditch, or how close to the lateral ditch, would it be farmed?

A. Well, I just didn't pay any attention to that.

Q. What kind of a crop had there been in that you were plowing up? A. Alfalfa.

Q. You were plowing an old alfalfa crop up, were you? A. Yes.

Q. And you said, as I understand, that there was no way to observe that water on the top of the land above the lateral ditch and between there and the bank of the North Canal.

A. I said it was an alkaline surface there.

Q. But there was no indication of water there?

A. No, not at that particular time, no.

Q. And that land slopes quite rapidly does it not, from the easterly toe of that North Canal clear down through the Shaw place, does it not?

A. That is right.

Q. Where there would be, if there was any seepage, a rapid runoff? A. Not necessarily. [66]

Q. But, in any event, it is quite a slope?

A. Yes.

Q. In percentage of slope would you know how to estimate it?

A. I would say a thirty—thirty-degree.

Q. And how far a distance from the toe of the bank of the canal, or bottom of the bank of the canal?

A. Oh, I couldn't answer that very good.

Q. Well, would you make an estimation, please?

A. Probably two—two or three—That is pretty

(Testimony of Arthur C. Hawkins.)

steep. I don't know,—two or three hundred feet, three or four hundred feet.

Q. And how much of a slope would it be where you were plowing?

A. Well, that slopes pretty gradually, I believe, if I remember correctly.

Q. Pretty gradually, but it was a slope?

A. Yes.

Q. That sloped generally toward the east?

A. Toward the east.

Q. Towards Snake River? A. Yes, sir.

Q. Now, then, what year were they having trouble with the crop that you are talking about?

A. The year '46 that we lived there.

Q. You were living in this same Shaw house at that time? A. That is right. [67]

Q. And during what period of the year were you living there?

A. Well, we lived there some time in February, if my memory serves me right, we lived there until about December.

Q. That is February of '46?

A. That is right.

Q. And lived there until December of that year?

A. Somewhere in there.

Q. Where were you working during that period of time? A. Working all over the country.

Q. What were you doing?

A. Construction work, land leveling, land developing.

(Testimony of Arthur C. Hawkins.)

Q. Well, what do you mean by "all over the country"?

A. Well, working for different farmers that wanted leveling done and land development.

Q. You were not farming any of this land here around the Shaw place? A. No, sir.

Q. Or around in the vicinity fo the break?

A. No, not that year, but the year before I worked east of there.

Q. And how often would you be home at this Shaw house? A. Every night.

Q. Every night during the entire year?

A. No, not the entire year, because I didn't live there the entire year. [68]

Q. Well, the time that you were living there, from February to December? A. Yes, sir.

Q. You were there every night?

A. Yes, sir.

Q. What time would you get home at night?

A. Well, ordinarily it would be all the way from five o'clock until twelve o'clock.

Q. At night? A. Yes.

Q. And what time did you leave in the morning for your work?

A. Real early; sometimes daylight, and sometimes seven o'clock. Just depended on where we were going and where we went.

Q. What kind of an outfit were you working with, Mr. Hawkins?

A. HD-10 crawler tractor.

Q. You operated your own tractor, did you?

(Testimony of Arthur C. Hawkins.)

A. Yes.

Q. And I presume you left that tractor where you would quit your work at night?

A. Yes, sir.

Q. And drive in with your car and drive out to your tractor the next morning?

A. That is right.

Q. And then, getting back to the question of the crop, what kind of a crop was there in on this land in 1946? [69]

A. Hay.

Q. What kind of hay? A. It was alfalfa.

Q. You are certain it was alfalfa there in '46?

A. Well, I am quite sure. It might have been clover, but I didn't pay too much attention to it.

Q. Did you have anything to do with the haying of it? A. No, sir.

Q. How many acres of it was there?

A. There was—I don't know for sure how many acres. I think there were somewhere around eighteen or nineteen acres. I wouldn't say for sure.

Q. That is, in the whole patch? A. Yes.

Q. Now, then, you say there was some trouble out there in this haying season?

A. That is right. I heard the boys talking about it and I noticed they were having trouble getting it out.

Q. You never saw that?

A. Yes, I saw it, too.

Q. What did you see?

A. I saw that the hay was getting yellow, the alfalfa was getting yellow, before it was cut, even.

(Testimony of Arthur C. Hawkins.)

Q. How much of it?

A. There was about three or four acres there, approximately. [70] I wouldn't say for sure.

Q. Now, where this break occurred that you are talking about, that isn't in any draw at all, is it? It is kind of on the crest of a little ridge that goes down through that territory, is it not, pretty much to the center of that ridge?

A. Well, now, I wouldn't just like to answer that. I just don't remember.

Q. There isn't any draw there at all, is there, where that break occurred and where that water flowed down through there? There may be a draw to the north of it or to the south of it, but——

Mr. Lytle: We object, your Honor, as argumentative. The witness has already disclosed an answer.

Mr. Hess: This is cross-examination.

The Court: Now, just a minute. If there is objection made, allow me to rule. I will rule. You don't have to worry about that. The objection is overruled. This is proper cross-examination.

Mr. Hess: Would you read the question, please.

The Court: Read the question.

(Pending question read.)

Q. (By Mr. Hess): Will you answer the question? A. I don't believe I could.

Q. Well, you didn't really observe that condition there [71] closely at all? You had no reason or occasion to, did you, Mr. Hawkins?

A. Not in particular, no.

(Testimony of Arthur C. Hawkins.)

Q. You were interested in your own work and were just interested in going up there and seeing what the thing looked like, and that is all there was to it, when the break occurred? That is right, isn't it?

A. I was interested in what was going on, yes. I thought I might learn something when I went up there.

Q. Now, then, that cat that you speak about being stuck in the mud there, as you state, that was pulled out by an International truck, is that correct? A. That is right, with a winch on it.

Q. That truck was up there for the purpose of working in connection with that break, was it not?

A. Yes; it was hauling fuel there, no doubt.

Q. From a stock pile, and things of that nature, if you know?

A. Well, I would say not. I would say it was there for a service truck for the Caterpillar tractors.

Q. And for work in connection with the break?

A. Yes.

Q. Now, then, was that between five and six o'clock at night?

A. I would say between six and seven, I believe I stated.

Q. Between six and seven you think that was. And you were there how long that time? [72]

A. That was the time of the second break. We were there——

Q. No, I am not talking about that——

(Testimony of Arthur C. Hawkins.)

A. That is when the tractor was stuck, yes.

Q. Oh, I see. Between six and seven o'clock, then, in the evening there had been some water that had come over this embankment, and that is what you went up there to see, is that right?

A. That is right.

Q. That is, that they had been putting in? There had been some water there? A. Yes.

Q. Now, how long did you say you stayed there? You think a half an hour?

A. No, I think longer than that. I think we stayed until about dark.

Q. Who was there?

A. Mr. Terhune and another son and I.

Q. And did you help there?

A. We took the International truck and started it up and put it onto the tractor and helped pull it out.

Q. And that was during that period of time?

A. That is right.

Q. And you think the engineer, Mr. Gordon, was there; and Mr. Terhune, you say?

A. That is right. [73]

Q. And Mr. Powers?

Mr. P. J. Gallagher: Clowers.

Q. (By Mr. Hess): Mr. Clowers?

A. Yes.

Q. Anyone else?

A. Not that I remember of.

Q. Who was it that was handling the tractor, do you remember? A. Mr. Terhune.

(Testimony of Arthur C. Hawkins.)

Q. Mr. Terhune.

A. Always runs his own tractor.

Q. And you think the ditch at that time was about carrying a half of what it ordinarily carried, half full? A. That would be my judgment.

Q. I see. And you say there was a cofferdam above, upstream from the break? There had been a dam put across there? A. Yes.

Q. Now, that we get this picture clear, this cat that was working there, what did it try to do?

A. Mr. Clowers was trying to 'doze the dirt from the north end of the break into this stream of water that was coming over the bank, to head it off, to dam it off.

Q. What did they do at the cofferdam?

A. The water washed it out completely.

Q. I see; the water cut that out? A. Yes.

Q. Now, then, was the water that—Well, when you left that evening the water was still going over the top of this part of a fill that they had already put in where the first break had gone out?

A. Yes, sir.

Q. That was what you last saw that night?

A. Yes, sir.

Q. Now, then, as a matter of fact, do you know whether or not you were back there that next morning at all? A. Yes, we went up—

Q. That very next morning?

A. Yes; we went up there some time—I don't know just for sure what time, but we were up there before we went to work.

(Testimony of Arthur C. Hawkins.)

Q. Who went up there? Who went up there?

A. Well, I and one of my sons.

Q. What time in the morning did you go up there?

A. Well, it was before we went to work.

Q. Well, what time did you go to work?

A. I couldn't say exactly.

Q. Well, could you give us a guess?

A. It was at a time of year when we weren't very busy, so we weren't in any big hurry to get to work.

Q. Well, what time would you say?

A. Seven o'clock.

Q. In the morning? [75] A. Yes.

Q. And between six and seven o'clock in the morning, when you were there, how much of a body of water was coming down?

A. I just don't remember. My memory doesn't serve me.

Q. The top was all washed out?

A. Yes, sir.

Q. You are certain of that? A. Yes, sir.

Mr. Hess: That is all.

Redirect Examination

By Mr. P. J. Gallagher:

Q. Now, just a minute, Mr. Hawkins. Now, the activity that Mr. Clowers was engaged in, as I understand, he was trying to move dirt in from the north side of the canal to stop the flow of the

(Testimony of Arthur C. Hawkins.)

water over the new bank? A. Yes, sir.

Q. And then did he go from that point of that observation up to try to strengthen this cofferdam?

A. Yes, sir.

Q. And how long would you say he was trying to put in the cofferdam to stop the flow?

A. Well, when we left he was still working there at that particular spot.

Q. At the cofferdam? A. Yes, sir. [76]

Q. And was he still working on the cofferdam when you left? A. Yes, sir.

Q. Had Terhune got his cat out and got it operating at the time you were there?

A. No; he had got it out, but was operating—He was instructed to 'doze part of the canal bank off to make him a road up on top.

Q. Was he moving any dirt at all when you left there?

A. Well, he was trying the best he could to get up on top. He had a very difficult proposition.

Q. So that he wasn't doing any 'dozing when you were there?

A. Not trying to stop the break. He was 'dozing, trying to get a road up on top.

Mr. P. J. Gallagher: I think that is all.

Recross-Examination

By Mr. Hess:

Q. Just one question that I overlooked on cross-examination. How far would you estimate that it was from the lateral ditch that flowed under-

(Testimony of Arthur C. Hawkins.)

neath the downstream bank of that North Canal to where this crop was that you were cutting? How far below in distance?

A. Well, let's see—I just don't remember. I imagine that a rough estimate would be a couple of hundred feet, anyway a hundred feet.

Q. That is, the upper edge? [77]

A. Yes. I never tried to come down to the distance.

Q. That would be the upper edge of the field where they had this alfalfa in that you were talking about?

A. Well, the whole strip was in alfalfa.

Q. That is what I am talking about.

A. Yes.

Q. That would be, the upper edge of that alfalfa field would be about two hundred feet from this ditch, this lateral ditch?

A. Yes.

Mr. Hess: That is all.

(Witness excused.)

Mr. P. J. Gallagher: Call Mr. Hust, George Hust. [78]

GEORGE HUST

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Will you spell your name, please.

A. (Spelling): H-u-s-t.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live, Mr. Hust?

A. The first place south of the Ben Shaw place where the break occurred.

Q. And how long have you lived there?

A. I came there July 13th of 1944.

Q. And you have lived there ever since?

A. I have lived there ever since.

Q. Are you familiar with the location on the canal where the break took place?

A. Fairly familiar, yes.

Q. And are you familiar with the general outline of the Shaw ranch? A. Yes.

Q. And, as I understand it, that Shaw ranch lies below the point where the canal broke?

A. That is right.

Q. Did you ever have any experience in trying to irrigate or [79] helping Mr. Shaw irrigate his lands there?

A. I think I irrigated for him once, yes.

Q. And what year was that, please?

(Testimony of George Hust.)

A. I am pretty sure it was in '45.

Q. And what time of the year?

A. I couldn't say exactly what time of the year, but I was irrigating second cutting of hay.

Q. And would you tell how those ditches run and what you observed there as to there being any surface water that was not in any irrigation canal?

A. Well, I started up this ditch to turn the water down to irrigate this piece of alfalfa——

Q. Now, what ditch do you refer to, George?

A. The lateral ditch directly under the canal bank.

Q. Go ahead.

A. ——and I saw a little stream of water running down. Well, I stepped out of the ditch up on the bank and went on up and was going up the headgate—I presumed this water was coming from the headgate, and I got up a little ways and I saw my ditch dry again, so I stepped in the ditch and walked on up the ditch to the headgate.

Q. Did you find any ditch (sic) by that headgate? A. I did.

Q. Where was that?

A. Oh, I would say it was about three or three hundred and [80] fifty yards or so north of where the break occurred.

Q. Now, as I understand your testimony, there was part of that ditch that the water was flowing in and then you got above that water flow and the ditch was dry? A. That is right.

(Testimony of George Hust.)

Q. Could you tell where that water came from that was flowing in the ditch?

A. I couldn't tell exactly, no. I couldn't say where it was coming from. I could see where it came into the ditch but I couldn't see where it was coming from.

Q. And how far up the ditch from—Well, take it the other way: How far down from the headgate was the ditch dry until you ran into this water flow?

A. About, I would say, three hundred yards.

Q. And then how much water was flowing in the ditch below where the water came into the ditch?

A. I wouldn't attempt to estimate it, but there was enough so that it was flowing.

Q. Enough so that it was flowing? A. Yes.

Q. Did you observe the nature of the land around just immediately below the ditch, as to whether it appeared to be water-soaked or not?

A. Well, I didn't think it needed irrigating at the time.

Q. And how much of that area was in that condition? [81]

A. I didn't go down in the field. I followed the ditch along, and just what I could see right close to the ditch.

Q. Measuring it in—Take, for instance, the strip of land lying right immediately below that little ditch, how wide a strip would you say was in that condition?

A. Oh, I only looked down there once or twice.

(Testimony of George Hust.)

I would say maybe a hundred feet, something like that.

Q. Was that condition readily observable to you?

A. Well, yes.

Q. Have you been back there, or were you back there, after the break occurred, George?

A. Yes.

Q. And have you observed the place where the wash took place below the break and down across the field?

A. I did.

Q. And that is shown there, or attempted to be shown there, on Exhibit 82 that is on the board. Could you say whether or not this little ditch that had the water in—Could you locate the point where the water was in on that plat? Mr. Hawkins has tried to draw that little ditch up there. Would you agree with that location, and then see if you can determine about where the water was?

The Court: Well, let's see—Before he does that let's find out whether he understands and agrees with the map as it is drawn so far. [82]

Mr. P. J. Gallagher: Yes. George, look that map over. Archie Hawkins has tried to draw a little ditch up there. See if you can find that. It is right under that canal.

A. On this ditch that he has drawn?

Q. Yes. Have you looked at that now?

A. Yes.

Q. Now, can you locate about where the water was running in it?

The Court: Well, that lays no foundation to that.

(Testimony of George Hust.)

I want to know whether he thinks that is where the ditch was.

Q. (By Mr. P. J. Gallagher): George, does that location that Mr. Hawkins made coincide or agree with about the location that you were?

A. Yes, I would say that it was very close.

Q. How, then, will you show the Court about where you saw the water running in that little canal, little ditch?

A. Well, I would say approximately right almost where it broke.

Q. Right under the break, you think?

A. That is my opinion, yes.

Q. Now, put an "X" there and your own initials, George, "G.H."

(The witness thereupon marked on said exhibit as directed by counsel.)

Q. Now, then, how far south or down the ditch was that water [83] running?

A. Well, I first noticed wet dirt directly when I stepped into the ditch across my fence, and that would be about—well, about 200 yards or better below there, in the ditch; and I walked in the ditch——

Q. Will you point out approximately where you are talking about——

A. Well, right here (indicating ——This is——

Q. That line there is——

A. That is the boundary of the Shaw place?

(Testimony of George Hust.)

Q. No, that is the boundary of what you said was the wet area.

A. Oh, that is the boundary of the Shaw place (indicating)?

Q. Yes. A. My place is directly south.

Q. And when you came across the fence you stepped into your little ditch?

A. Came right into the ditch. It is right down the fence line.

Q. What was the condition there?

A. It wasn't entirely dry, but it was dry enough to walk in.

Q. And how far did you walk in the ditch before you struck running water?

A. Oh, I would say pretty close to a hundred yards. [84]

Q. Well, how far did the ditch run there?

A. You mean how far did water run in it?

Q. That is right, up to where you first discovered water?

A. Pretty close to a hundred yards there.

A. And then above that the ditch was dry?

A. That is right. It wasn't entirely dry. It was dry enough so you could walk in without getting your feet dirty.

Q. George, your place comes right down to the south line of the Shaw place?

A. That is right.

Q. And your north land would be how far south of where the break occurred?

(Testimony of George Hust.)

A. Oh, I would say about 200, possibly 250 feet.

Q. Feet? A. Or yards.

Q. Yards. Is there any place on your ranch in that immediate vicinity that you have described where there is seepage now from the ditch?

A. Well, there's several——

Mr. Hess: We object to that as incompetent, irrelevant and immaterial.

The Court: No.

Mr. Hess: He asked "now."

The Court: Well, you had better testify about it. I saw it this morning. We had better hear from it. [85]

Q. (By Mr. P. J. Gallagher): What was your answer, George?

A. Well, will you state the question?

Q. The Court Reporter will read it to you.

The Court: Read it to him.

(Pending question read.)

A. There is one place, I would designate it maybe about a hundred yards from my north fence, that has got a little stream running out of it.

Q. (By Mr. P. J. Gallagher): How long has that been running, George?

A. It was running there when I came on the place.

Q. That was the year what? A. '44.

Q. '44. Does it run all the year around?

A. No. No, about two weeks, approximately, after the water is turned in the canal it starts running. It runs about two weeks after it is turned in.

(Testimony of George Hust.)

Q. Are you acquainted with the officials that manage the ditch? The ditch rider?

A. I am acquainted with the ditch rider.

Q. Have any of those men been down to that seep with you and observed it?

Mr. Hess: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [86]

Q. (By Mr. P. J. Gallagher): Do you know who the ditch rider was there in 1945?

A. I do.

Q. Who was that? A. Tom Pettet.

Q. And '46? A. The same.

Q. '46 before the break occurred?

A. Yes, sir.

Q. Who was the ditch rider in '44?

A. Tom Pettet.

Q. Now, during the years of '44, '45 and '46, up before this break occurred, did Mr. Pettet come to this spot on your place there?

Mr. Hess: Object to that as incompetent, immaterial and irrelevant.

The Court: Well, I am inclined to think that the question of notice may enter into this.

Mr. P. J. Gallagher: That is what it is offered for, your Honor.

The Court: All right, he may answer.

A. I don't know if he ever came down to that break before it occurred. I never did—or that leak—I never did see him down before the break occurred.

(Testimony of George Hust.)

Q. (By Mr. P. J. Gallagher): Have they been back there since [87] that time?

A. They have.

Q. And do you know for what purpose or what they were doing there?

A. I only know that they put a weir in there to measure the flow of water that came down.

Q. Now, during '44 and '45 and the early part of '46, when that seep was running, was it running about the same as it is now?

A. No, it wasn't running near as much.

Q. Was it running enough so that a person had any trouble seeing it looking down from the bank?

A. Well, it was running a garden hose full of water.

Q. I didn't hear your last answer.

A. It was running a garden hose full of water. We had a garden hose stuck in there to take the flow of water away, and it would——

Q. Now, at the present time, it was running when we were out there, it was running a perceptible stream that you could see down there. How long has that continued?

A. That has run since the break occurred.

Q. Would you say it was running now more than it was when the break occurred?

A. Considerably more.

Q. Are there any leaks down on your place further south? [88]

A. There's three.

Q. And how far away from the point where this break occurred?

(Testimony of George Hust.)

A. Well, there is one on my south line, or almost on my south line, and another one about 300 yards north of it; then there is another one about, well, 400 yards north of that.

Q. Now, do they run as much water as this one near your north line? A. One of them does.

Q. And have the irrigation ditch riders measured those, also, from time to time?

A. I don't think so.

Q. Now, you spoke about one trip to the Shaw ranch, George. Did you make any other trips out there, where you observed the water conditions up near the canal? A. Not that I remember.

Mr. P. J. Gallagher: Not that you remember. You may cross-examine.

Cross-Examination

By Mr. Hess:

Q. I didn't get it where you lived, Mr. Hust.

A. The first place directly south of the Shaw place.

Q. You have lived there since July, '44, did you say? A. That is right.

Q. Where did you come from prior to that?

A. Bend, Oregon. [89]

Q. And that had been your first experience in this country, in 1944?

A. I was born and raised over around Weiser, Idaho.

Q. And how long did you reside at Bend?

(Testimony of George Hust.)

A. Approximately two years.

Q. What is your age, Mr. Hust?

A. Pardon?

Q. What is your age, please?

A. Thirty-one.

Q. Thirty-one. And you state you irrigated for Shaw in '45? A. Yes.

Q. For how long a period?

A. Well, I think it was either two or three days.

Q. Two or three days; and what kind of a crop were you irrigating? A. Alfalfa.

Q. How big a crop, how many acres?

A. I couldn't say. I would say there was, oh, probably five or six acres in the piece I was irrigating.

Q. Did you turn the water in this ditch, this lateral, to do that irrigating? A. I did.

Q. And you state that when you crossed the fence, over from your fence in a northerly direction and stepped in the ditch, that it was somewhat dry there? [90]

A. It wasn't dry. It was damp, but it wasn't what you would call really muddy.

Q. It was just damp? A. That is right.

Q. And how much further was it up where you got where you say that you couldn't say that it was running any amount but you could say that it was just running?

A. Oh, approximately a hundred feet—I walked up, I would say, 50 feet before it got too muddy to walk in, and then I walked up a little ways further

(Testimony of George Hust.)

before I could see down in the ditch—It was overgrown with weeds and stuff—before I could see down in the ditch and see the water.

Q. And then you went on above and it was still wet on up to the weir—or to the headgate?

A. No, it was damp.

Q. Damp all the way through there?

A. Yes.

Q. Clear up to the headgate?

A. That is right.

Q. Now, what time of year was this?

A. I couldn't say exactly, but it was the second crop of hay. I presume it was in July some time.

Q. You presume it was in July. Had water previously been turned down the lateral?

A. You mean before that year? [91]

Q. No, that year.

A. Yes, it certainly had.

Q. It what? A. It had.

Q. And they had been irrigating through the lateral prior to the time you assisted there?

A. That is right.

Q. How wide and deep is that lateral?

A. Oh, it varies. I should say it averages about two feet wide and maybe a foot, a foot and a half deep.

Q. But, as I understood you, that was the only observation you took of that? You didn't notice anything relative to the crop that would indicate any seepage, when you were irrigating?

A. Just a little below the ditch bank is all.

(Testimony of George Hust.)

Q. How close to the ditch bank, Mr. Hust?

A. Oh, in spots where the hay was thin you could see, maybe, down maybe ten or fifteen feet below the——

Q. Ten or fifteen feet. Did it just look wet, or what? A. It looked a little wet, yes.

Q. No other indication?

A. The hay was a little yellow.

Q. You state that you couldn't observe anything above the lateral ditch whatsoever, any dampness at all? A. Just indications of it.

Q. What do you mean by indications? [92]

A. Well, a heavy growth of Russian thistle and grass and weeds.

Q. You never noticed any dampness, however?

A. I couldn't see the ground.

Q. And from the top of the canal you couldn't have seen it at all? A. Just the growth is all.

Q. Now, ever since you have been there in 1944 you state that there is this little seepage that starts in there about two weeks after the water is turned into the North Canal?

A. Approximately two weeks, yes.

Q. And you say that that gets as heavy, sometimes during the summer months when the water is in the canal, as much as what a hose would carry off?

A. It did before the break, a hose would carry it off.

Q. What kind of hose?

(Testimony of George Hust.)

A. A regular little garden hose, a piece about, oh, approximately five feet long.

Q. But that would carry it off? A piece five feet long would carry it off?

A. It would carry it away, yes.

Q. And how far from the bank of the canal would that start to appear, how far from the lower edge of the bank of the canal?

A. About 30 feet, 35 feet, something like that.

Q. And the other two indications of just a seepage that you [93] observed there on your place, how far from the bank of the canal were they?

A. Which two?

Q. I think you described one north, didn't you, about a hundred yards north?

A. There was three leaks besides that.

Q. Three besides that? A. Yes.

Q. All right, how far from the bank of the canal were those other three?

A. Well, the one of them, the one in the middle of the place, is in a little draw and there is water seeps out underneath there, right underneath the bank of the canal, all the time when there is water in the canal; and those others are about, oh, between 40 and 50 feet from the lower bank of the canal.

Mr. Hess: That is all.

(Testimony of George Hust.)

Redirect Examination

By Mr. P. J. Gallagher:

Q. George, when you went up to irrigate on that occasion on the Shaw ranch, when you finally got up to the headgate was that open or closed?

A. Well, the headgate was open. He had a flow of water running out of the headgate, but running on a pasture running out north of there.

Q. Was this lateral closed off from that flow?

A. That is right.

Q. Now, when counsel asked you about the condition of the hay, you say that was a little yellow along there? A. Along the ditch, yes.

Q. And on the other side of the ditch you found a pretty rank growth of Russian thistles and grass?

A. A very rank growth.

Q. How high up on the canal bank was that growth discernible?

A. Oh, I would say a third of the way up, I would say, from the lateral up to the top.

Q. Measured in feet, George, what would you say that would be? A. Oh, probably 15 feet.

Q. And this leak that is on your place now just south of the Shaw ranch, you say that when that first started a garden hose would carry it off?

A. That is right.

Q. But since the break in the canal has been repaired a larger volume of water flows through there? A. A much larger volume of water.

Mr. P. J. Gallagher: That is all.

Mr. Hess: That is all.

(Witness excused.)

Mr. P. G. Gallagher: Call John Turner. [95]

JOHN TURNER

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Is yor name John Turner?

A. Yes, sir.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live, John?

A. I live now on the Howard Bybee place.

Q. Howard Bybee's ranch? A. Yes, sir.

Q. And that is in the vicinity of Nyssa?

A. Yes, sir, between Nyssa and Ontario.

Q. And where were you living in 1946, Mr. Turner? A. I was living on Ben Shaw's place.

Q. And in 1945 where were you living?

A. In 1945 I was in the U. S. Navy.

Q. And were you associated with or working with Archie Hawkins during 1945?

A. I was employed by him in running a cat.

Q. And is Ben Shaw related to you?

A. Ben Shaw is my uncle.

Q. And was he operating and in possession of that little ranch in 1946? [96]

(Testimony of John Turner.)

A. Yes, he was living on it and he was running it.

Q. Now, first, John, did you help him get his hay crop off of there in 1946?

A. Yes, I went to work—Hawkins didn't need me that day and I went up there to help him hay.

Q. Were you up there after the ditch broke, John?

A. Yes.

Q. Do you know something about how that land lays below where the break occurred?

A. Yes, fairly certain.

Q. I wish you would take a look at that map and see if you recognize anything on Exhibit 82, see if that is familiar to you?

A. Well, I don't know the exact place, but this is——

Q. Well, is the map pretty well familiar to you, so you can pick up a spot?

A. Yes, I can see where it flows down across the place.

Q. Do you recognize the location of the canal on top there?

A. Yes.

Q. And do you recognize where it says "Wash-out" as meaning anything to you?

A. Yes, I recognize where the canal broke and ran down across the field.

Q. Now, John, see if you can locate a little headgate in the canal? [97]

A. Yes, this must be it running around here (indicating).

(Testimony of John Turner.)

Q. Are you familiar with about where that ditch is?

A. Yes, I have been up there quite a few times.

Q. I see. What were you helping Ben Shaw do there, John?

A. I was helping him stack hay that certain day.

Q. What crop of hay were you trying to get off?

A. Well, it was between clover, volunteer alfalfa and grass.

Q. Was it the first or second cutting?

A. Second cutting.

Q. And where was the hay being drawn in relation to those two washes there?

A. This hay was being taken off of this field there down to his house and stacked at the barn.

Q. Was there any of that area, John, that was wet, that you had difficulty getting your machinery to operate on?

A. Yes. We was pitching hay, was in that particular field that particular day, and up here by this lateral we had the tractor that was coming on a slip, and we had horses drawing a slip, and as we got up here to the very top of this ditch,—

Q. Which ditch?

A. This here lateral,—As we got up close to it,—Of course, we had been in the field quite a little ways—we got the tractor stuck, and so my cousin, who was pitching with me, said, “We have got to get this tractor out,” and so as we were doing that we saw the water that was seeping in where the [98] wheels spinned down.

(Testimony of John Turner.)

Q. How far was that particular spot below the main canal, the Owyhee Canal?

A. Well, I wouldn't say exactly, but, just approximately,—Oh, well, I couldn't say exactly, but I noticed and I said to my cousin—

Mr. Hess: Pardon me.—We object to that.

The Court: Objection sustained.

Q. (By Mr. P. J. Gallagher): You can't say what you said, John, but just state approximately the distance.

A. I would say approximately 250 feet.

Q. From the main canal? A. Yes.

Q. And how much of an area was so wet you couldn't operate a tractor?

A. Well, we couldn't see clearly, but, looking over it, we could estimate approximately an acre and a half.

Q. How far was the water from the surface of the ground?

A. The water wasn't on the surface of the ground, but we could see down where it was when the wheels cut down in the ground.

Q. How deep did your wheels cut in the ground?

A. I would say approximately five or six inches.

Q. And did the water rise in the tracks?

A. Yes. [99]

Q. And how did you get the hay off?

A. Finally we had to pack this hay up here with pitchforks.

Q. Who was doing the cutting of the hay?

A. Ben Shaw cut the hay.

(Testimony of John Turner.)

Q. And with what type of equipment?

A. He cut this hay with horse-drawn equipment.

Q. And could you say whether he had any difficulty?

A. I could see where his horses had walked across and mired down in there.

Q. How many days were you haying there, John, getting that little spot out?

A. Well, I would say approximately two or three days. I quit before we was through and went back to running the cat.

Q. You were running the cat for Mr. Hawkins?

A. Yes, sir.

Q. And was that in '46, John? A. Yes.

Q. That was before the break occurred?

A. Yes, this was before the break occurred. This was the first cutting of hay.

Q. Will you give me again your answer to the type of grass that was growing there?

A. This was clover, volunteer alfalfa and water grass.

Q. Water grass is the big, heavy, coarse grass?

A. Water grass you will find along your ditches anywhere [100] where there is lots of water.

Q. How much of the area under the ditch there would you say had a good area of the water grass in?

A. You could see it very easily, on account of it was cut down, and there was approximately an acre and a half to an acre.

(Testimony of John Turner.)

Q. Were you out there at the time this second break in the canal occurred, John?

A. Yes, sir.

Q. Mr. Hawkins, who was just on the stand, spoke about a Mr. Turner who went up there with him. Are you the Turner he referred to?

A. That's me.

Q. I wish you would tell, in your own words, the things you saw and did there during the period of time that you were on the ground on that evening that Mr. Hawkins said the ditch broke the second time?

A. Well, as I said, we had just got home and we heard some water coming down, so we both grabbed our hats and we run for the ditch. When we reached the ditch we seen the water was coming over the top of the ditch. Like he said, the cat was on the north side of the ditch, pushing over the ditch, and each time that he pushed his load over it would knock his load down on the ditch, so he run his cat over and he began to push down into the ditch. [101]

Q. And who was driving that cat?

A. Glowers was driving that cat.

Q. Clowers; and you say he was pushing in dirt to try to stop the water from coming over the top of the canal. What part of the break was he working on?

A. He was working from the north side.

Q. 'Dozing dirt in from the north side?

A. Yes, sir.

(Testimony of John Turner.)

Q. Was he making any headway towards stopping the flow over the dam?

A. Every time he would push a load over the water would catch it and throw it down over the side of the dam.

Q. Then, you stated, he went up someplace to where there was a cofferdam. Where was that located with reference to the break? Was it above or below? A. It was above.

Q. And would you say how far?

A. I wouldn't say exactly.

Q. And when you left there what was the Clowers bulldozer doing?

A. It was upstream 'dozing down onto the cofferdam when we left.

Q. You mean at the site of the cofferdam or at the site of the break?

A. No, he had went up to the cofferdam when we left and was [102] 'dozing down into the ditch.

Q. What was the purpose of that cofferdam, do you know?

A. I wouldn't swear to that exactly.

Q. Was there another cat there?

A. Yes, Mr. Terhune had his cat there.

Q. And where was Terhune's cat?

A. It was stuck down along the south side of the break.

Q. Could you step over there again and, after studying that map, mark about where the Terhune cat was stuck?

A. Well, of course, the break here run clear up

(Testimony of John Turner.)

to your canal, and there was a tree right here alongside the break that set down across the field away from the break,—in there somewhere (indicating)——

Q. Has someone else written the word "Cat" there? A. Yes, there it is (indicating).

Q. Does that agree with your notion of where the cat was located?

A. It was there, if not further from the break.

Q. Could you state whether or not the cat was stuck in the mud created by the break or in damp ground?

A. I couldn't state to that, but by the looks of the cat it was stuck in there and it had settled on him.

Q. Did you help get that cat out?

A. Yes, sir.

Q. What did you do? [103]

A. I ran the truck.

Q. And the truck, I understand, had a winch on?

A. That is right.

Q. All right. How late in the day were you there, John?

A. I would say approximately around six o'clock.

Q. And how late did you stay there?

A. It was fairly dark, because a guy pulled up with his car and had his lights on.

Q. Now, was the water still running over the bank at the time you left? A. Yes, sir.

Q. Did you go back the next morning?

A. No, sir.

(Testimony of John Turner.)

Q. Did you see it again at all after it was repaired?

A. I have never been up there at all after it was repaired.

Mr. P. J. Gallagher: I see. You may cross-examine.

Cross-Examination

By Mr. Hess:

Q. Let's see whether I have got this right. You lived at the Howard Bybee ranch, do I understand, Mr. Turner?

A. I live there now.

Q. Since you got out of the Navy?

A. That is right.

Q. And in '46 you were at the Shaw place?

A. That is right. [104]

Q. What is your age?

A. Twenty-three years old.

Q. And you worked for Mr. Hawkins during that year and helped Shaw with just this one hay-ing, is that it?

A. That is right.

Q. How many days did you work for him?

A. I would say two or three days I worked before I was through.

Q. How much of a crew did he have?

A. He had his kids and him and another one; I believe his name was Hibbard.

Q. Do you know whether or not that land was seeded to clover in 1946?

A. I wouldn't say exactly, but it looked like it was, on account there was more clover than alfalfa.

(Testimony of John Turner.)

Q. And how much of that grass would you say there was in proportion to the clover and——

A. Well, to the clover, it had just been mowed, you couldn't tell exactly, but you could see the water grass above the crop itself.

Q. But there was very little quantity?

A. I wouldn't say that.

Q. But what I am talking about was the amount that you put up as hay?

A. There was enough in the hay that you would pick up the hay and it would all spring apart, which would mean there was [105] so much grass in your hay the hay would fall apart.

Q. Well, what percentage was in the grass?

A. I wouldn't say exactly.

Q. Could you estimate?

A. I am no authority on that, so I wouldn't care to estimate that.

Q. Now, then, you say that tractor was stuck up there by that tree. What was that tree?

A. I wouldn't say exactly.

Q. How big a tree was it?

A. It was a slim tree and grew very straight and didn't throw much shade, because we cussed it quite a bit because it wouldn't throw much shade.

Q. How high was it?

A. I would say fifteen feet, something like that.

Q. That was below the lateral ditch, is that right?

A. I would say it was above. I wouldn't say exactly.

(Testimony of John Turner.)

Q. The tractor was stuck below the ditch?

A. Yes, sir.

Q. And that was above the tree, isn't that right?

The tree stood up close to the break?

A. The cat was stuck down in the field.

Q. You don't know how close they were together?

A. I don't know. I didn't pay much attention.

Q. In fact, you wouldn't know whether the tree was above or [106] below the lateral?

A. I wouldn't say exactly.

Q. Now, then, when Mr. Turner (sic) went up with you in the evening, you think you went up about six o'clock,——

A. You mean I and Mr. Hawkins?

Q. Mr. Hawkins, yes.

A. I would say approximately, yes. We had returned from our work.

Q. You generally quit work at what time?

A. Very late. We tried to get to work as soon as we could and quit as late as we could, to get as many hours as we could get on the cat.

Q. You would generally stay out until dark, did you, in the evening?

A. Not exactly. We tried to get home in time to get to bed so that we could get up early in the morning.

Q. What time did you leave in the morning?

A. In general, like he said, we weren't working too steady right then and we would get out around six or seven, something like that.

(Testimony of John Turner.)

Q. And you both went to work that morning together, did you, the morning after you had been up there on the bank and helped pulling the tractor out?

A. I wouldn't swear to that, but I know I wasn't up there the next morning after it broke. [107]

Q. You were not there the next morning at all?

A. No.

Q. You and he were together during the day, were you?

A. Yes, his son and I. What one wasn't working helped keep the equipment up.

Q. And how old is this son?

A. He is either twenty-three or twenty-four.

Q. But the three of you ran this tractor?

A. That is right.

Q. And that was the crew for the tractor?

A. That is right.

Q. And you would all go out together and come in together?

A. Not exactly. Sometimes one of us would run it at night, wouldn't come in together.

Q. But at that time you and he were working together, you and he and his sons?

A. That is right.

Mr. Hess: That is all, your Honor.

(Witness excused.)

Mr. P. J. Gallagher: Call Mr. Shaw. [108]

BEN SHAW

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: What is your first name, Mr. Shaw?

A. Ben.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live now, Mr. Shaw?

A. Near Plymouth.

Q. And did you formerly live on what we have been calling the Shaw place, located up near where the ditch broke in 1946?

A. I did.

Q. I wish you would step down to that map and take a look at it, Exhibit 82, and see if you can recognize that drawing as being anything like your place was after the ditch broke. That doesn't show all your place, Mr. Shaw.

A. Well, I don't understand this line here (indicating). What does that represent?

Q. Well, that is supposed to represent an area that shows signs of being water-soaked. Does that help you any?

A. I believe I can understand it.

Q. All right. Now, can you locate on that and see where the North Canal is?

A. The canal here (indicating). [109]

Q. Now, there is also a little place marked

(Testimony of Ben Shaw.)

“Head Ditch” down below. Can you locate that?

A. Yes.

Q. Now, from locating those main objects there, do you recognize what is marked there as “Wash-out”?

A. Yes.

Q. When was that land washed out there, Ben?

A. When was this washed?

Q. Yes. A. In 1946.

Q. And what caused that wash?

A. A break in the canal.

Q. Were you home when that canal broke?

A. I didn't live on that place.

Q. Oh, you were not living there then?

A. I lived at the end of Gem Avenue, two miles south.

Q. In 1946— '45 and '46, what were you raising on that place?

A. Well, in '45 I had grain in that particular ground, and in the fall of 1945 I planted clover, that is, on a portion of it, and south of the—South of there I had alfalfa.

Q. Did you have any trouble raising a crop there on account of excessive water at some of those spots?

A. Yes, I did.

Q. What particular part of the ranch, what location on the [110] ranch, in what area, would you say that you had too much water?

A. Well, there was—What bothered particularly was just a small part about the head of where that break took place, that wash.

(Testimony of Ben Shaw.)

Q. What did you observe there as to the underground water conditions?

A. Well, there was never any running water to my knowledge there, but it was very soft. Horses driving across it would mire down considerable, and water would stand in horse tracks and places like that. There was no running water.

Q. What time of the year did you observe that, Ben?

A. Well, I couldn't say as to that. I don't think it bothered any time only when there was water in the ditch.

Q. I see. After you started irrigating, then, it would be hard to get machinery across?

A. Yes, that is right.

Q. I mean to say, when there was water in the big canal that condition would show up on your place?

A. That is right.

Q. Now, you heard these boys testify to the trouble they had helping you get your hay off of that land. I wish you would tell the Court about how much of that area you were attempting to cut with your equipment where you had trouble with the water conditions. [111]

Mr. Hess: We object to that as assuming a state of facts not testified by this witness.

Mr. P. J. Gallagher: It is.

The Court: Objection sustained.

Q. (By Mr. P. J. Gallagher): Mr. Shaw, in the year 1945 did you attempt to hay in there yourself?

A. In 1945?

(Testimony of Ben Shaw.)

Q. Yes. A. Yes, I had grain there.

Q. You had grain there. Well, during '45 did you have any trouble harvesting that crop?

A. Some.

Q. And what was that trouble due to?

Mr. Hess: We object to that as calling for a conclusion of the witness.

The Court: Overruled.

A. In binding across this particular place the bull wheel of the binder would slide.

Q. (By Mr. P. J. Gallagher): Was it wet?

A. It was wet.

Q. Wet to the extent that the bull wheel would slide? A. Yes.

Q. Now, in '46 what did you have growing on that area under the ditch there, or the canal?

A. I had clover in the particular place where the wash is. [112]

Q. Where the wash is. Did you have any alfalfa growing in there?

A. Nothing only what might have been volunteer. We plowed out our alfalfa two years before.

Q. Were there any grasses mixed up with that?

A. Yes, to a certain extent there was.

Q. What was the nature of that?

A. Well, there was weeds of 'most any kind, so far as that goes, some water grass.

Q. Now, water grass,—Will you describe that to the Court, as to whether or not it is a well-known variety of forage, or is it just some wild

(Testimony of Ben Shaw.)

grass that grows up with an excessive amount of water?

A. Well, I wouldn't say particularly that it grows where there is an excessive amount of water particularly, because anybody on these lands has trouble with it.

Q. Now, in the harvesting of that crop in '45—in '46, I mean to say,—in '46, did you have any trouble in cutting that hay crop in '46, Ben?

A. I did.

Q. Was it the first or the second crop?

A. The first.

Q. The first crop; and just what was your difficulty there?

A. Well, it was just too muddy to mow across. I did manage to wallow through it. I used horses.

Q. Was there water on the surface or just immediately below the surface?

A. Well, just immediately below, you might say. Like I say, it would just come up in the horse tracks but never seemed to run off.

Q. And how much of an area was affected that way?

A. Oh, I wouldn't say exactly, but approximately a hundred and fifty feet.

Q. A hundred and fifty feet square, or wide?

A. Square, each way, I would guess at it.

Q. How far north does your line go, Ben?

A. How far north?

Q. Yes.

(Testimony of Ben Shaw.)

A. Well, in that particular forty where the wash is it is forty acres wide.

Q. Did you own the land for some considerable time after the ditch washed out?

A. Well, I sold the land a year ago last January.

Q. That would be, a year ago,—That would be 1947. You know pretty well where those washes are that came that were caused by the ditch break, where they are located now on the land. Was there any of that area wet, Ben, that was north of where the washes showed? A. North of the washes?

Q. Yes. [114]

A. Yes, there is quite an area that has always been wet.

Q. Now, further on over on the north side of your place, is there a draw down through there?

A. Yes.

Q. That is still on the old Shaw place?

A. Yes.

Q. Is there some seepage that runs into that draw?

A. There is quite a large stream of water runs there, and it runs the year around, since the canal was put in there, they tell me. I don't know. I never saw it before.

Q. Then there is a definite wet area north of the place where the wash occurred and the ditch broke?

A. Yes.

Q. Could you say how wide that would be, Ben, across there? A. That is, the first wet place?

(Testimony of Ben Shaw.)

Q. Yes.

A. How wide? Well, I would say it was—That I don't know; I never measured it.

Q. Would you say it was as much as a hundred feet?

A. Well, it is bigger than that across it; probably 250 feet.

Q. I see. When did you first acquire this place, Ben?

A. I homesteaded it in 1937.

Q. 1927? A. '37.

Q. '37. And when did you first notice this moisture up there [115] under the bank?

A. Well, I never noticed it when I first seeded this place, but I would say it was there approximately three or maybe four years before it broke.

Q. Before the break? A. Yes.

Q. What have you to say as to whether there had been an increase in that moisture, either in area or in extent of the moist condition of the land, from year to year?

A. Well, I never noticed the increase in particular, only in '46.

Q. In '46. That seep in the draw on the north side of your place, is that visible, Ben, from the ditch bank?

A. Yes.

Q. The road on top? A. Yes.

Q. And there is a considerable stream of water flows from that seepage?

A. Yes, there is. There is water from the canal.

Mr. P. J. Gallagher: You may cross-examine.

(Testimony of Ben Shaw.)

Cross-Examination

By Mr. Hess:

Q. There is just one other question on this lateral. Will you complete that lateral? Will you complete it where it runs through your place there?

A. What do you mean? This is close to being the head here, I reckon.

Q. Yes.

A. It should run around ahead of a little draw in here that comes down here to the lateral headgate up here (indicating), and on this it——

Q. Is that about right where that line is drawn?

A. That is just about right; and then it runs directly east.

Q. Will you continue it on from there. Make an "X" there and continue it on.

A. That, of course, runs straight east. It goes down here, I would say back below the buildings down here (indicating).

Q. Back below your buildings?

A. Yes, sir.

Q. I see. Then there is another one that goes out on the other side, is there, Mr. Shaw?

A. A lateral here.

Q. Yes. A. There is one comes down——

Q. Draw that, please. Draw that lateral.

A. Well, it runs off a little like this, I guess, and then down along there (indicating).

Q. And mark that lateral, will you. Mark that lateral also. Now you can just take your seat, Mr.

(Testimony of Ben Shaw.)

Shaw, please. How wide is that lateral that runs southerly and then down through your [117] field there? How wide is that ditch?

A. Well, it isn't the same all the way. It is approximately, I would say, two feet.

Q. And how deep?

A. In some places it is quite deep and other places——

Q. What do you mean by "quite deep," Mr. Shaw?

A. Well, where it has washed in the steeper part of the ground there, especially on that dam.

Q. How deep would you say, Mr. Shaw?

A. Oh, it is probably two feet deep.

Q. How often is water carried through that during the season?

A. Well, I usually irrigate my hay twice for each cutting.

Q. And how many cuttings do you have?

A. Three.

Q. And what times of the year does that take place?

A. Well, approximately the forepart of June, the first one, and then I would say the latter part of July, and then the third crop is usually different.

Q. Would that be some time the latter part of August,—through there? Some time the forepart of September?

A. Well, just to keep it from freezing up. I left it as far as I could.

Q. Now, the alfalfa that you left in that field,

(Testimony of Ben Shaw.)

alfalfa and alfalfa roots, many of them will come back again, you have some kind of a volunteer crop from that, as you do grain; isn't [118] that right?

A. Yes.

Q. And that is what you had in there with your clover, was a volunteer crop of alfalfa with it?

A. Well, any alfalfa would have been volunteer, because I didn't seed any.

Q. Was this new land that had been irrigated since the——

The Court; Now, just wait a minute. Alfalfa is a five-year crop, or more than that.

Mr. Hess: Well, only after it is plowed up. After it has been plowed up there would be certain roots that would be in the soil that would grow back again.

The Court: That is still not volunteer.

Mr. Hess: Well, I understand that, but I understand that is what was raised, whether that is an erroneous designation or not. A. That is right.

Q. And the grasses that you had were the normal grasses that you have normally on the new land in this country, is that right, in the hay?

A. Yes.

Q. There was nothing above your lateral ditch at any time in this area where the break was that had shown up, like any seeping that was on top of the soil?

A. Well, there was willows growing along where this particular [119] break was.

(Testimony of Ben Shaw.)

Q. Where were they?

A. On the bank above my ditch there.

Q. How far above it?

A. Well, they were quite close to the ditch.

Q. Quite close to the ditch? A. Yes.

Q. And could have been getting water from the seepage from your ditch?

A. Well, that wouldn't be my opinion that they were.

Q. But they could have been?

A. They could have been, I reckon.

Q. But, as you state, there was not any wetness on the canal bank at all there——

Mr. P. J. Gallagher: Just a minute. That is not fair cross-examination, because that is not what the witness said.

The Court: Well, if that is not what he said he can say that that was not what he said. It is fair cross-examination.

Mr. Hess: Would you read the question to him, Mr. Rauch?

The Court: Read the question.

(Pending question read.)

A. I don't believe I stated that there weren't any wetness there.

Q. (By Mr. Hess): Well, you had never observed any above that in your lateral ditch, had you?

A. Well, yes, I believe to a certain extent.

Q. There was nothing that stands out in your mind as to that at all, was there?

(Testimony of Ben Shaw.)

A. Well, I noticed those willows in particular, and I know it was damp, now, but, as I say, it wasn't maybe ten feet, something like that, from my ditch.

Q. This place where the break occurred was somewhat on the crest of a—We won't call it a ridge, but on a high place, was it not?

A. Well, where the particular wash was I filled in a ravine, nearing the north of the place, but it didn't extend up as far as where it broke out of the canal, but after it went down the hill approximately two or three hundred feet, why, I filled it up that far.

Q. Well, how far did the ravine reach up toward this place, to the bank of the canal?

A. I would say about two to two hundred and fifty feet, I would say, below my lateral.

Q. Well, that was high ground where the break occurred, however, was it?

A. Right where the break occurred it was high ground, but where the wash went down lower it was lower.

Q. It was lower. Now, this place that you designate where as a little draw on the place where the water seeps and goes through, generally how far north or south of this break was [121] that?

A. This particular place north is, I would say, oh, 300 feet to the draw.

Q. About 300 feet; and that is the place where you noticed most of the wetness, is that it?

A. That is right.

(Testimony of Ben Shaw.)

Q. And there has never been any break occur whatsoever at that place, has there? A. No.

Q. And there was much more indication of seepage up in that part, that far away,—

A. That is right.

Q. —that would tend to indicate that there would be a break, than where it did break?

A. That is right.

Q. That is correct, is it? A. Yes, sir.

Mr. Hess: Now, then, Mr. Shaw,—That is all.

Redirect Examination

By Mr. P. J. Gallagher:

Q. Just one other question, Mr. Shaw: You say that the little canal, the little draw, up on the north side of your place, is about how far from the place where the ditch break took place?

A. Well, I would say 300 feet. [122]

Q. Now, is that ditch bank wet all the way around that bend? A. No, it is not.

Q. Is the ditch bank wet at the place where the water comes out in the draw, where it is still running, runs the year around?

A. Well, it is wet enough that the Reclamation put in a drain after the break.

Q. Did they have a weir in connection with it?

A. Not to my knowledge, no.

Q. All right, now, getting back down to the place immediately north of the place where the break did take place, you say that that area under the ditch

(Testimony of Ben Shaw.)

there for a distance of 250 feet north shows signs of being wet? A. The ditch north, yes.

Q. Yes; but it doesn't go clear on around to where the ditch comes out of that draw on the north side? A. No.

Q. And when, then, did you notice the first time the willows growing on the side of the ditch in about where the break took place?

A. Well, I couldn't say that exactly.

Q. Was it more than a year or two before the break, would you say?

A. No; they weren't big willows.

Q. And about what area was covered with willow growth there [123] at the side of the ditch?

A. Well, I wouldn't know that.

Mr. P. J. Gallagher: I think that is all.

Mr. Hess: That is all.

(Witness excused.)

Mr. P. J. Gallagher: Your Honor, we had rather prepared to examine about this number of witnesses this afternoon.

The Court: All right. In order that you may know exactly what I am trying to do, I will hold court all day tomorrow, and Friday for a half day, then I will again convene Monday morning at ten o'clock. That gives you a little respite.

Mr. P. J. Gallagher: Yes, I understand.

The Court: I may start Friday morning at nine o'clock. I am not positive about that yet. See what progress you make tomorrow.

Mr. P. J. Gallagher: These witnesses who have testified today, this afternoon, will you want to call them back later on, or should I excuse them? They are all men that are busy.

Mr. Hess: What is that?

Mr. P. J. Gallagher: I say, these boys that have been on this afternoon, I would like to excuse them, unless you want to call them back.

Mr. Hess: No, your Honor, I don't.

Mr. P. J. Gallagher: If you do, we can get them. [124]

Mr. Hess: We think that that would be a pretty safe bet, that they won't be called back in again.

Mr. P. J. Gallagher: Then we can excuse them this afternoon? I will tell them that?

The Court: Yes. Court is now in adjournment until tomorrow morning at ten o'clock.

(Whereupon, at 5:15 o'clock p.m., Wednesday, June 9, 1948, the trial of the above-entitled cause was suspended, the Court taking an adjournment to 10:00 o'clock a.m., Thursday, June 10, 1948.)

June 10, 1948, 10:00 o'Clock A.M.

The Court: You may proceed, Gentlemen.

Mr. P. J. Gallagher: Call Darrell Percy.

DARRELL PERCY

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: What is your name, please?

A. Darrell Percy.

The Clerk: P-e-r-c-y? A. Yes.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live, Mr. Percy?

A. I now live out here, I believe it is eight miles east and about half a mile south.

Q. On a farm? A. Yes.

Q. During the year 1946 did you have any position with the Reclamation Bureau?

A. Yes, sir.

Q. What was your position? [126]

A. I was riding ditch for them.

Q. And, just briefly, what were your duties as a ditch rider?

A. Well, just delivering water, you know, in general, to the District.

Q. Did you have charge of the headgates on the various branches? A. Yes, sir.

(Testimony of Darrell Percy.)

Q. Do you recall the occasion of the break in the ditch in July of 1946? A. Uh huh.

Q. What part of the system were you patrolling at that time?

A. Well, I was below the break at the time. My ride, particular ride, was below the break. I was working on the crews up there at the break after the break occurred.

Q. And did you assist in such work as was being done to repair the break, Mr. Percy?

A. Yes, sir.

Q. Were you operating any machinery, or just hand work?

A. Well, no, not any machinery to speak of. Mostly all hand work, yes.

Q. Do you remember an occasion, after the break was repaired the first time, when you and some other employees turned down a head of water to the spot on the ditch where the break occurred? [127]

A. Yes, sir.

Q. Who went with you on that mission?

A. Well, there was Tom Pettet and Fred Kuhnley.

Q. Tom Pettet and Fred Kuhnley?

A. Yes.

Q. Were they also ditch riders?

A. Tom was. Fred wasn't. Fred was working with me on this other side; he was just helping.

Q. But Mr. Pettet had been the ditch rider for some years, hadn't he?

(Testimony of Darrell Percy.)

A. Yes, he has been a ditch rider there for quite a while, I think.

Q. As I understand it, the ditch first broke and then there were some repairs made, and after these repairs were being made, or after they were made, you and Mr. Pettet and this Mr. Kuhnley turned some water into the ditch, is that right?

A. That is right.

Mr. Hess: Just——

Mr. P. J. Gallagher: That is leading, but it is getting to the point.

Q. Now, then, how far along were the repairs made to the ditch at the time that you turned this water in?

A. Well, that is hard to estimate. I would say from four to six feet.

Q. That the bank had been built up? [128]

A. Yes, sir.

Q. And under whose direction did you turn the water down?

A. Well, it was under Fred, I would say, Fred Kuhnley.

Q. Fred Kuhnley? A. Yes.

Q. Were you there when Mr. Kuhnley received his orders as to what should be done?

A. Yes, I happened to be standing right there.

Q. And who told Mr. Kuhnley what should be done?

A. Well, I think the man is here. I believe his name is Gordon. He was an engineer from Boise.

(Testimony of Darrell Percy.)

Mr. P. J. Gallagher: Will you stand up, Mr. Gordon, and be Exhibit A, please?

(A gentleman in the audience stood up.)

Q. That was that gentleman? A. Yes, sir.

Q. What, generally, were your instructions, Mr. Percy?

A. Well, they sent me and Tom in the morning to get some water to fill this cofferdam, and, of course, the laterals were open and that didn't come up, and so they sent us up to get it so that they could use some of the water on that fill.

Q. Above the break will you just describe how the laterals lead out of the ditch and what number there were?

A. Well, I don't remember just exactly. Some of them were pretty good size, they carried quite an acreage, and others [129] were small, you know.

Q. And what time of the day did you start out to get this water down?

A. Well, it was around four o'clock, I would say.

Q. Four o'clock in the afternoon? A. Yes.

Q. At that time were they still working on building up the embankment? A. Oh, yes, yes.

Q. And what equipment did they have there at that time?

A. Well, they had the dump trucks running; I couldn't say just how many. Then they had two cats there, I think, working, two 'dozers, at the time.

Q. And you say the embankment was up somewhere between four and six feet?

(Testimony of Darrell Percy.)

A. Something like that, yes.

Q. Now, will you describe the ditch above the break, as to whether or not there are any stop gates or siphons or other means by which the water was held back?

A. Well, there was—The only thing, I guess, is that there were several of these little—I don't know how to tell you, whether they would be cofferdams—just sack dams, you see, at some of these laterals where farmers had been taking out water above the break.

Q. How many of those sack dams were there in the ditch [130] between the break and, say, Sheep Creek siphon?

A. Well, if I remember right, there was four or five.

Q. And how many gates were there between the break and Sheep Creek siphon?

A. Well, that is—I couldn't say for sure, but I imagine about eight or ten, somewhere along in there.

Q. And what did you do towards closing the gates?

A. We just shut them all down and locked them.

Q. And did you take out these temporary dams that were in there? A. No.

Q. They were left in? A. We left them in.

Q. Now, will you describe for the record just what Sheep Creek siphon is?

A. Well, it is just a big check right at the head of the pipe.

(Testimony of Darrell Percy.)

Q. No, the siphon itself? Is it a siphon of similar type to this Commander Siphon out here?

A. Oh, yes, something like that.

Q. But much shorter? A. Oh, yes.

Q. Does that siphon carry the entire flow of the North Canal across the Sheepshead Creek (sic)?

A. Oh, yes. [131]

Q. Now, was there anything done at the upper end of the Sheep Creek siphon to stop the flow of water?

A. Yes, there were some checks in there.

Q. Just what were they? What was the nature of those checks?

A. They were 4 by 6 timbers, if I remember right.

Q. Were they placed across the face of the siphon?

A. Crossways, whatever the check is.

Q. And were those checks in there when you and Mr. Kuhnley and Mr. Pettet got up there?

A. Yes.

Q. How much of the water, of the flow of the canal, was held back by the checks in Sheep Creek siphon?

A. Well, I don't know, I have never had too much experience above there, but it was quite a body of water; it went back up quite a long ways.

Q. Was the ditch pretty well filled above Sheep Creek?

A. Well, yes, it was up pretty well, you know. Of course, they had Sheep Creek checked pretty

(Testimony of Darrell Percy.)

high, you see, and it was filled up pretty high.

Q. And when you say "filled up pretty high" you mean the check boards were up pretty well toward the top?

A. Well, pretty well, yes.

Q. What did you do towards releasing the water that was backed up by these boards?

A. Well, we pulled the checks out. [132]

Q. When you say "checks" do you mean——

A. We pulled the planks out, you see, check boards.

Q. Did that release the volume of the water that was held back, then? A. Oh, yes.

Q. And how many of the check boards did you pull out?

A. If I remember right, it was four.

Q. How far down did that release the water from the head of the siphon?

A. Well, I would say about two feet and a half, something like that.

Q. All right, then how far is it from the head of the siphon up to the Lockett Spillway?

A. Oh, I would say around three miles, something like that.

Q. Did you notice the amount of water that was in the canal between those two points as you were going up the stream, the canal?

A. Well, I didn't pay no great lot of attention to it, no. It was a pretty fair head of water. It was checked so, you know, so that you couldn't really tell what the flow of it was.

(Testimony of Darrell Percy.)

Q. No, I was asking the volume of water in the ditch. Was the ditch pretty full?

A. Well, no, I wouldn't say awfully full. I would say it looked and viewed to be up to normal.

Q. What is the apparatus in the ditch at Lockett Gulch which controls the flow of water in the ditch?

A. Well, I don't know just how to explain it. They are maintained on a wheel, on a headgate, you know. You maintain your steel gates.

Q. Steel gates across the canal? A. Yes.

Q. And how many of those gates are there?

A. Two.

Q. Side by side? A. Yes.

Q. And does that control the flow of the water down the canal? A. Uh huh, I think it does.

The Court: Now, just for clarity on my part, will you point out on the map, or have somebody point out on the map, where Sheep Creek siphon and Lockett Gulch are?

Mr. P. J. Gallagher: I will probably have to step over there myself, to see it myself, your Honor.

The Court: All right.

(The Court, Mr. P. J. Gallagher, and one of the Reclamation Bureau engineers here approached said exhibit and a conversation in an undertone, inaudible to the Reporter, ensued.)

Q. (By Mr. P. J. Gallagher): When you got to Lockett Gulch, [134] Mr. Percy, how far open were the gates?

(Testimony of Darrell Percy.)

A. Well, I would say about two feet. They open from the bottom up, you know.

Q. From the bottom up to the gate was about two feet? A. Uh huh.

Q. Do you know how wide across those gates are?

A. No, I don't. About eight or ten feet, though, the others are, I think.

Q. What was done towards opening the gates any further?

A. Well, Tom opened one and I opened the other one.

Q. How far did you open them up?

A. Oh, I would say we raised them about two feet.

Q. That would make the total clearance under the gate four feet?

A. Yes, somewhere in there.

Q. Did you observe the amount of water that was released and going down the ditch after the gates were open?

A. Well, no, I really didn't. You know, I had never seen that particular ditch. It is pretty hard to guess on a ditch you have never seen under pressure, you see.

Q. Was that water under pressure under the gates, coming out? A. Oh, yes.

Q. What percentage of the capacity of the ditch would you say was filled when you opened the gate? How far up on the ditch? [135]

(Testimony of Darrell Percy.)

A. Well, I don't know. It must have been probably three feet, something like that.

Q. Well, it was two feet from the bottom, then you opened it two feet. Would it be more than three?

Mr. Hess: We object to that as suggestive, your Honor. A. I misunderstood your question.

The Court: No, I think the witness was slightly confused. I think it is all right to call it to his attention. He testified it was raised to four feet already. Is that what you want to stand on, that you raised the gates to four feet?

A. Yes, that is about right. I misunderstood the flow of the canal.

Q. (By Mr. Gallagher): Will you answer the question again. I asked you about how far up on the ditch the water was after you opened the gates?

A. Well, I didn't pay no particular attention, because we opened the gates and went on back to the break, you see, and it was right there in that cut, you see, so you couldn't really tell. You see, the road is already 10 or 15 feet, maybe 20, above the ditch, you see, in that long cut right at the Lockett Gulch.

Q. What time of the day was it when you finally opened the gates at Lockett Gulch?

A. Well, it must have been in the neighborhood of five o'clock in the evening. [136]

Q. Now, at the Lockett gateway is there a spill-way above that to spill water over into Lockett Gulch? A. Yes.

(Testimony of Darrell Percy.)

Q. What was done towards closing the spillway gate? A. Well, sir, I really don't know.

Q. Let's see, there were three of you in the party? A. Uh huh.

Q. You don't know what was done at the spillway gate?

A. No, I don't know what was done to it.

Q. And was there a considerable head of water back of the iron gates when you opened them?

A. Yes, sir, it was backed up quite a bit. There was quite a bit of water backed up there. I did notice it going down the spillway gates. Just what had lowered it I couldn't say.

Q. Where did you go after you manipulated the gates at Lockett Gulch?

A. We went on back to the break.

Q. Did you get back before the head of water reached there? A. Oh, yes.

Q. How long did it take you that evening to get back from Lockett Gulch to where the break occurred?

A. Oh, I suppose probably an hour, something like that.

Q. Driving along the ditch bank? [137]

A. Yes, we just drove right down the ditch bank.

Q. Do you know how long it would take the water, in the normal flow, to make that same distance?

A. Well, I don't know. I imagine probably an hour, something like that.

(Testimony of Darrell Percy.)

Q. And how far apart—

Mr. Hess: We move to strike that out your Honor. It is just imagination.

The Court: No, it isn't imagination. It is just an estimate on his part. I can judge his qualifications. As a matter of fact, I can make an estimate myself. Go ahead.

Q. (By Mr. P. J. Gallagher): What is the mileage between Lockett Gulch and the place where the break occurred?

A. Oh, I would say, just to guess at it, five or six miles.

Q. How long did you stay on the job after you got back that evening?

A. Well, we didn't—We never stopped on the job. We was supposed to—I think, if I remember right, we were supposed to get off at four o'clock, and it was a little after six, so I and Tom went right on home.

Q. When did you first learn that the ditch had broken the second time that night?

A. Well, the next morning, about eight o'clock.

Q. When you got back what did you find there in the condition of the bank? [138]

A. The bank was all gone, you know, and just a head of water going through there.

Q. The bank was all gone? A. Yes.

Q. That is, the bank they had been working on the day before?

A. Well, there was just a little left on the north end.

(Testimony of Darrell Percy.)

Q. Could you estimate the length of the fill that they had put in, that they had been working on the day before? A. Oh,—

Q. If you don't know, there are other witnesses that would know more accurately.

A. Fifty feet, I would say. I couldn't say,—maybe sixty.

Q. And when you got up from your home the next morning the bank was all taken out, except a little portion on, you say, the north end?

A. Yes.

Mr. P. J. Gallagher: All right. Now, the testimony will be for a little different purpose, a little different line of testimony, your Honor.

Q. Did you continue on as a ditch rider for the weeks immediately following the ditch repair?

A. Yes, sir.

Q. What are, now, did you supervise, starting in—or what laterals did you supervise?

A. Well, I rode from the head of the big siphon here west. [139]

Mr. P. J. Gallagher: May I locate that on the map, your Honor?

The Court: Yes.

Q. (By Mr. Gallagher): Would you step down here, Mr. Percy. Now, that mark I am pointing to is the head of the big siphon. Will you just state what area you supervised west from that point?

A. 38.9—Here it is, 38.9, lateral 38.9.

Q. That is 38 on the map?

(Testimony of Darrell Percy.)

A. That is lateral Number 38.9, yes, sir.

Q. Did you ride the territory clear to the end of that lateral? A. Yes, sir.

Q. And that lateral takes off from the main canal at the head of the siphon? A. Uh huh.

Q. When did you get the water into your lateral for distribution to the farmers, Mr. Percy?

A. Well, sir, I can't answer that question exactly. I got water, though, in my portion just as soon as they got water in the second time, but now I can't give you the exact date of that.

Q. That is all right. Do you know what the capacity of your lateral is in inches or second-feet?

A. Well, it runs from about 2400 to 3000 inches, the way it [140] was running.

Q. You mean miner's inches?

A. That is the portion of water that we run most of the time.

Q. And by "inches" do you mean miner's inches? A. Yes.

Q. Now, that was your normal supply of water for your farmers there? A. Yes.

Q. Now, how long did it take you after you first got water to build up to—for the supply to build up to where you had your normal water supply?

A. Well, I can't tell you exactly, but it was in the neighborhood of a week to ten days, I would say.

Q. During that period of time was your supply of water below the normal demands of the farmers?

A. Oh, yes.

(Testimony of Darrell Percy.)

Q. Was that supply built up gradually, or did you suddenly get your normal supply?

A. We built up pretty gradually. Each day we would get granted a little more as the ditch raised below us.

Q. And how was that supply regulated to you?

A. Well, it was five inches, the normal supply, then they would give me my percentage of my five inches for my district, you see; if it was 25 per cent, —I forget what we started with [141] —and then we would get an addition to that, usually, every day, to that, you see.

Q. And that continued on for a period of a week or ten days? A. Yes.

Mr. P. J. Gallagher: You may cross-examine.

Cross-Examination

By Mr. Hess:

Q. As I understand, your part of the ditch here that you were riding was from 38.9, Mile Post 38.9, to the Sheep Creek siphon, is that correct?

A. Yes.

Q. Well, just state, what was it?

A. I rode from 38.9 mile post on west toward Vale.

Q. On west toward where? A. Vale.

Q. Toward Vale? A. Yes.

Q. How many miles did you cover?

A. I think it figured eleven miles at 36 miles. Now, I am not positive as to that.

Q. Did you work there at the point of the break

(Testimony of Darrell Percy.)

other than handling this water, this flow of water that you speak about? Did you work at the break?

A. Well, I worked there all the time during the break while the water was coming. [142]

Q. What was the nature of your work that you were doing?

A. Well, I don't know. You would just call it a kind of a flunky job, and little odd jobs, such as that,—hauled in headgates, and such as that.

Q. That was during the time the 'dozers were operating across this fill that they were making to repair the first break? You were there during that period of time? A. Uh huh.

Q. And how wide was that first fill that they were putting in,—that is, that covered the first break? How wide would you estimate that?

A. How wide—

Q. That is, figuring up-and-downstream of the canal? I mean, how big a break was it, in your estimation?

A. Well, I would say about 50 feet, somewhere, 60.

Q. About 50 or 60 feet?

A. Along in there someplace.

Q. I see. And after the water had been turned in, as I understand, you had heard about this second break about eight o'clock the next morning, is that correct?

A. Yes, I was there to go to work the next morning at eight o'clock, around eight o'clock.

(Testimony of Darrell Percy.)

Q. Was there any water flowing out of there at that time? A. Yes.

Q. How much water? [143]

A. Well, I wouldn't attempt to say. There wasn't too awful much going out of there at that time.

Q. Not much water going through it?

A. Oh, I would say four or five hundred inches, I would say. It wasn't too awful much.

Q. Is that miner's inches? A. Yes.

Q. Four or five hundred miner's inches?

A. Yes.

Q. How much of the north bank of that fill, or the south bank of that fill, whichever it was, was still remaining?—That would be the upstream side, as I understand, the upstream side of the fill?

A. Oh, I would say there was a lap there of about, oh, 15 or 20 feet.

Q. That hadn't gone out? A. Yes.

Q. And you stayed there during the whole repair, then, the completion of the repair?

A. Uh huh.

Q. That never did go out, did it?

A. Oh, no, no. I think it was finally worked down on the second repair, but it never did go out, no.

Q. And how high was that bank,—that is, from the bed or bottom of the ditch, how high was that fill, would you say? [144] How far had it been built up, how many feet?

A. Oh, I would say from about four to six feet, along in there.

(Testimony of Darrell Percy.)

Q. That is an estimation. It could have been higher than six feet, could it not?

A. Well, it was right in the neighborhood, yes. You know,——

Q. Around the neighborhood of six feet, would you say?

A. I think so, four to six, along in there.

Q. And that was four to six feet high over the top?

A. Yes.

Q. Was there any evidence that water had gone over the top of that? Did you notice anything of that nature?

A. I misunderstood your last question there. I thought you meant how high was the fill when the water was turned on.

Q. Well, how high was the fill on the north side—or, I don't mean the north side—the upstream side—How high was that fill that remained?

A. Oh, I would say about eight feet.

Q. It was about eight feet high?

A. Uh huh.

Q. That is, from the bottom of the North Canal?

A. Uh huh.

Q. And that is the way you found that the next morning when you came down to work?

A. Uh huh. [145]

Q. Was there evidence that water had spilled over the top of that?

A. Yes, sir.

Q. There was evidence that water had gone over the top of it?

A. That is right.

(Testimony of Darrell Percy.)

Q. And I presume some of the loose dirt had been taken off of the top there?

A. It was washed. There was, oh, several little crevices, you know, perhaps a foot wide, a foot deep, where the water had washed across it.

Q. From the top of it? A. Yes.

The Court: I may say, Mr. Hess, that I don't understand this testimony. He talks about four to six feet, and then you ask him something else and he talks about eight feet, and I don't understand.

Mr. Hess: Well, I don't understand that either, your Honor.

A. Well, I don't know what you are asking?

Q. (By Mr. Hess): The only question I was asking you is, how high was this fill from the bed of the canal, that is, the bottom of the canal, that was remaining on the upstream side of the fill that had been made?

A. Well, I suppose that piece we stuck on there was about [146] eight feet.

Q. I see. In the repair and during the repair of this first break, I will ask you if the repair had been made level across that first break?

A. No.

Q. The same height? A. No.

Q. Describe that, in your own language.

A. The north end was quite a lot higher than the south end.

Q. How much higher would you say?

A. Well, I don't know. They dumped trucks in there. The gravel came from that way, and the

(Testimony of Darrell Percy.)

north end was quite a little bit higher than the south end or the middle.

Q. Did the trucks or the 'dozers, during the time that they were making that fill across there, work straight across the fill in their tamping the dirt down? How did they do that?

A. Well, they worked both ways, see. Sometimes they would go straight across and then bring in dirt and go the other way. They was trying to go all ways.

Q. How wide was the fill,—What I mean, now, is not the length upstream and downstream, but the width over the top—would you say?

A. Oh, I would say in the neighborhood of about 30 feet. It was the full width of the other old bank, you know.

Q. That is, on the top. [147] A. Yes.

Mr. Hess: I think that is all.

Redirect Examination

By Mr. P. J. Gallagher:

Q. Mr. Percy, one of your answers was a little confusing,—not in relation to counsel's question. Counsel was asking you about the height of this embankment and he used the word "upstream," then you gave the height of the bank as of the north end. Now, the north end would be the downstream side of the ditch, wouldn't it? A. Yes.

Q. The ditch runs north and south?

A. Yes.

Q. Is it your answer that the 8-foot height that

(Testimony of Darrell Percy.)

you observed there was on the north end of the embankment, or the downstream side?

A. It was on the low side, yes, the downstream, not on the upstream.

Q. And was that the portion that was still remaining the next day? A. Uh huh.

Q. And then the entire portion of the bank that was built in there on the south end or upstream side was washed out? A. Uh huh.

Q. And you say there was evidence that the water had gone [148] over the remaining—the part of the bank that still remained, when you saw it the next day? A. Uh huh.

Q. I see; and that, you think, was as high as eight feet on the north end there?

A. I would say something like that.

Q. Counsel also asked you whether or not the bank when you last saw it was level clear across.

A. No.

Q. It was not? A. No.

Q. And you think the bank was built up higher on the north side? A. Considerably higher.

Q. Considerably higher. Were they 'dozing the dirt in from the north and the south, both?

A. Yes, trying to mix it you know.

Q. One question I didn't ask you: When you got back from your mission upstream, opening these headgates, before you went home had the water begun to run over the bank at that time?

A. No.

Q. It had not? A. No.

(Testimony of Darrell Percy.)

Mr. P. J. Gallagher: That is all, Mr. Percy, thank you. [149]

Mr. Hess: That is all.

Mr. P. J. Gallagher: Just a minute, Mr. Percy, please. All right, thank you.

(Witness excused.)

Mr. Lytle: Call Mr. Terhune. [150]

HUBERT F. TERHUNE

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Your name, please?

A. Hubert F. Terhune, T-e-r-h-u-n-e.

The Clerk: Hubert?

A. Yes.

(The witness was thereupon duly sworn.)

The Clerk: Hubert F. Terhune.

A. That is right, commonly known as Jack Terhune.

Direct Examination

By Mr. Lytle:

Q. Where do you live, Mr. Terhune?

A. Four and a half miles southwest of Nyssa.

Q. How long have you lived there?

A. Two years in April.

Q. Where was your place of residence prior to that time?

A. Richmond, California.

(Testimony of Hubert F. Terhune.)

Q. What is your business or profession?

A. Well, I am engaged in land leveling.

Q. How long have you been engaged in that type of work? A. For about twenty-two years.

Q. Has your work during that past 22-year period been confined wholly to land leveling, or work of that kind?

A. General construction in the grading field, construction [151] and paving.

Q. What construction work have you engaged in?

A. Highway, airport, levees, and small earth-filled dams.

Q. Have you engaged in any construction in connection with irrigation projects?

A. No, nothing only of a very minor nature.

Q. Were you acquainted in 1946, in the month of July, with what is known as the Owyhee Project North Canal?

A. Yes, sir, I was contacted and I went up there.

Q. Did you do any work on that canal in that month of that year?

A. Yes, I spent about two weeks there. I don't remember the exact day of arriving there or leaving there, but in the neighborhood of about ten days or two weeks.

Q. What was the nature of the work you were doing?

A. I was operating my equipment. I was running a tractor, 'dozer.

Q. What type or model of tractor and 'dozer did you have?

(Testimony of Hubert F. Terhune.)

A. I have a D-8 Caterpillar tractor, and I had a LaPlante-Choate angle 'dozer at that time.

Q. What would be the over-all weight of that machine?

A. It is written on the side as weighing 46,600.

Q. Did I understand you to say that you were contacted to go up on that job?

A. Yes, sir, that is right. [152]

Q. Who contacted you? A. Mr. Spofford.

Q. And who is Mr. Spofford?

A. I presume he is in charge of the Reclamation District in that locality.

Q. His headquarters are where

A. Are at Nyssa.

Q. About what time of day or night was it when you went up to this particular job?

A. I presume that I arrived at the particular scene of the break with my equipment at about eleven o'clock, and that was my first sight of it.

Q. And what did you see?

A. There was a gap there in the ditch bank on the lower side that had washed out, and there was one tractor working there at that time.

Q. Do you know whose tractor was working there at that time?

A. It belonged to Clowers Brothers.

Q. Clowers Brothers?

A. Yes, that is right.

Q. How much of a gap was there there?

A. Well, it would seem to me at the bottom it would be about 15 feet wide and at the top perhaps

(Testimony of Hubert F. Terhune.)

60 feet, shaped down. There had been some work. They had already started removing loose material in the bottom and they were working out through the gap.

Q. You say they were placing the loose materials in the bottom?

A. They were working loose material out of the bottom of the break and shoving it outside at the time I got there.

Q. Did you do any work in the bottom of the canal? A. Yes, I did.

Q. From the part where you started to work were you able to see what would be the normal bottom of the canal,—that is, on the section either south or north of the break?

A. Well, I don't know whether I completely understand that question or not. When you speak of the bottom would you mean the bottom of the normal grade of the canal or the bottom of the canal as I saw it then?

Q. The bottom of the normal grade?

A. No, it was very much washed out and very much lower than the bottom of the normal grade would have been. I don't know how much lower, because it would be pretty hard to tell exactly how far the bottom would be but it was completely washed down to the sandstone.

Q. It was washed down to what type of material?

A. A brown sandstone material.

Q. And how did that brown sandstone lay as to being flat or sloped?

(Testimony of Hubert F. Terhune.)

A. Well, it seems to be in layers about four to six inches [154] and it flaked off very easily, being soft, and the slopes in the seams seemed to slope out with the natural ground level, which is out toward the valley.

Q. Now, the west bank of the canal, was that toward the valley or toward the hillside?

A. Well, now, I am not too familiar with directions there. I never did quite straighten out on directions. I would rather refer to it as upstream and downstream and the valley side or the hill side.

Q. All right. Observing the map on the board, which is Plaintiffs' Exhibit No. 82, indicating on that map that the direction of flow of the canal at that point is north——

A. That is right, referring to this map the flow is north, but this would be what I would term the back side. If the flow is going this way (indicating) that would be the left side of the canal going downstream,——

Q. Yes.

A. ——and the right side, looking downstream, would be the valley side.

Q. Would be the valley side. Now, was the bank side of that stratum in the ditch where you started to work higher at the bank side or the valley side?

A. Well, it is much higher on the bank side. That would be the left side, looking downstream. It is much higher.

Q. From the physical evidence on the ground on that section [155] of the canal from the north end to

(Testimony of Hubert F. Terhune.)

the south end of the break, could you indicate in some manner to determine the construction of the ditch originally?

A. Well, it would be pretty hard to determine the construction of the ditch originally, outside of having this sandstone bottom, which we cleaned out and was washed out reasonably well on the upstream end, back to the cofferdam that we had in there, which was possibly, oh, 200—no, between 200 and 300 feet, I would say, back of the break. The cofferdam was in there, and in that section you could see very plainly it was down to your sandstone. It was already washed out, and we cleaned out any loose sandstone that was in there; but downstream from the break it was practically under cover and not cleaned out or even washed out, so the silt and everything was in the original place as it had originally been.

Q. From that section of the break down to the cofferdam did you find any evidence of a core or core wall of any sort to the original ditch?

A. No, there was no evidence of any core being used whatsoever in the bank and showing in the break.

Q. You mention a cofferdam about 250 feet upstream of the canal. Was that in when you arrived there?

A. Well I believe it was. I believe that was in. If it wasn't in, then it must have been put in shortly afterwards, [156] but just to be certain, it was either in or put in shortly afterwards.

(Testimony of Hubert F. Terhune.)

Q. Very close, one way or the other, at the time you arrived? A. That is right.

Q. Now, just what work did you do?

A. Well, I operated the equipment. At first we cleaned out all this material in the bottom of the ditch, then after the engineers were satisfied with the bottom of the ditch, why, we cut away the banks on each side of the break to get back to some type of material that would show up reasonably sound, and after we cleaned that back on each side of the break, which we probably cleaned back 25 feet, I would say, on the upstream side and possibly 50 or 60 feet on the downstream bank, and after that was cleaned to their satisfaction and cut back, why, then we cored where we were going to place the fill to go across the break, we cored it down possibly two to three feet, and maybe a little more, with a 'dozer, and then they took some hand men and went in there and attempted to core it down another 18 or 20 inches, probably two feet at the most, and I believe they also used a drag-line over on the side, where it was used to get the core trench on down a little deeper.

Q. Now, tell the Court rather in detail what you mean by coring. [157]

A. Well, coring is to get down below where you have a core or a plug in solid, firm material that couldn't be washed out, due to your sandstone bank on the downstream as well as the upstream side. In other words, you just place a core of selected material which is satisfactory to them to be watertight

(Testimony of Hubert F. Terhune.)

or so water can't get through it, and being that this core is solid no water can get through it, and it also keeps the bottom of your fill on top absolutely dry, because you don't have that seepage coming underneath.

Q. Now, what material was used in the coring?

A. It was the material out of a spoil bank, as I remember, that we had removed, which evidently satisfied the engineers and must have been all right, because it is still there.

Q. Now, you are talking about the engineers. Who was the engineer?

A. Mr. Gordon there was the man chiefly in charge of the job, I presume under Mr. Spofford, as he was also around.

Q. After having built your trench for the core,—

A. That is right.

Q. —did you then proceed with the fill?

A. That is right, we proceeded to backfill the trench in layers and compact it by running the tractors back and forth over it.

Q. Was there any compaction of the core by means other than your tractor traffic over it? [158]

A. That is all; that is right.

Q. I may be just a trifle confused. I understand, then, by your answer that there was no other compaction—

A. No other compaction used except the tractors being taken back and forth over it several times.

Q. Now, as the process of building up the valley

(Testimony of Hubert F. Terhune.)

side bank or the outer bank of the canal progressed, where did you get the earth?

A. The earth was partly imported and partly the old spoil bank that we had shoved out in cleaning out these ends of these wings of the break. I would say probably 75 per cent imported and 25 per cent of the material of an old spoil bank and excess dirt on the ditch bank was used.

Q. And from where was it imported?

A. I don't know exactly, but it was something like—Well, they had a dragline in once about a mile west, I believe,—No, let's see. It would be perhaps a mile east from that place, in that farmer's place. I don't remember who the farmer is. And then they moved material, I think, from possibly three or four miles southeast of the break.

Q. In any event, Mr. Terhune, it was quite some distance from the scene of the operation?

A. That is right.

Q. Was any earth taken from the higher bank or the hillside?

A. Nothing only for silting-in purposes in the bottom as we [159] raised the fill. None of the dirt on that side of the bank came into our operation.

Q. How was that operation performed?

A. It was the Reclamation District's tractor. They put it up on top and he pushed dirt over off of the top of the hill and it fell down into the bottom where the break had been and where we had cleaned out in the section we had opened up.

Q. And over how long an area was that?

(Testimony of Hubert F. Terhune.)

A. Oh, I presume he worked over an area perhaps 200 feet long along the ditch bank along the upper side.

Q. When that earth was spilled in the canal was there any compaction whatever of that?

A. No, sir; it was spread out a little bit but there was no particular effort made for compaction of that particular earth that was put into the bottom of the canal for silting purposes.

Q. Did this tractor remain up on the hill or mountain side during the entire period that you were there?

A. No. No, he came down. He perhaps worked up there six or eight hours pushing over and then he came down and crossed back over to perform some other duties on the slope side of the canal that we were working on.

Q. Did he come down north or south of the break.

A. He came downstream from the break.

Q. Did he come down on a regular roadway?

A. No; they had built a road and he went up and down the side of the bank on the road that they had constructed up there just for that purpose.

Q. Now, can you give the Court any idea of the grade of that bank which he came down the last time?

A. Well, I would presume the bank at the point where he came down was possibly 35 feet high and he took an angle down it of about—oh, let's see, I guess he must have come down on an angle with the ditch of about 60 degrees. Probably about a 30 per

(Testimony of Hubert F. Terhune.)

cent grade coming down or upwards is about all a cat will climb.

Q. That is, on his line of travel?

A. That is right.

Q. Now, about what was the grade, if you could say, of the bank itself?

A. I could say on about a one-to-one slope, possibly slightly steeper, although—No, it seems like it would be probably about three-quarters-to-one. It is reasonably steep at that particular point.

Q. What was the nature of the material at that place in the bank, if you know?

A. Well, up the bank it is more or less of a chalky silt, chalky-looking silt, and of course as you came down on the bank you would run into stratas of what is termed sandstone and hard pan and the like of that. [161]

Q. Did you observe him when he came down?

A. No, sir, not particularly.

Q. Did you observe that particular point after he came down? A. No, sir.

Q. About what time did you arrive at the scene for work?

A. I imagine around shortly, I would say,—well, reasonably close to six o'clock in the morning.

Q. Did you immediately proceed to work with your equipment?

A. That is right. Probably within twenty minutes after arrival, why, I——

Q. How long did you work, Mr. Terhune?

A. I generally worked until about—well, more

(Testimony of Hubert F. Terhune.)

or less depending on how the job could stand the work. If it was something that we could do I would work a little longer hours, or if it was where one cat could take care of it, why, twelve hours would have been about my average day's work, generally quitting somewhere around seven, seven-thirty in the evening.

Q. Did you work in connection with that fill from the time following the first break up to the time of the second break? A. I did.

Q. On the evening before the first break—before the second break, did you have your equipment in operation?

A. During the evening before the second break? Yes, I had it in operation before the second break.

Q. Did you have any difficulty in connection with any of your [162] equipment?

A. Well, at the time the water topped the fill—Maybe I don't quite understand that question. I believe the way you probably mean it, at the time the water went over the fill I had already shut down and was already preparing to go home, I had serviced my equipment and was getting ready to go home, when the water came over the top of the fill.

Q. Now, how late did you work with your equipment the evening before the second break?

A. I worked until, I would say, shortly after midnight; I would say between twelve and one o'clock, possibly twelve-thirty or in that vicinity.

Q. Was there an occasion before you quit that night when water came down the canal?

(Testimony of Hubert F. Terhune.)

A. I don't believe I understand that just exactly as to how you mean.

Q. Was there any occasion that night before you quit work when water came down the canal and in that portion of the canal where the break was repaired?

A. Well, I believe you will have to state that different for me to get just exactly what you want me to answer.

Q. Well, all right. At any time that night was there water running in the canal at the point where you had been repairing the break?

A. Yes, there was; at the time the water went over the top [163] of the bank, why, there was water in the canal.

Q. All right, now, when did that water first come?

A. Well, to the best of my knowledge now, due to the time that I was generally quitting, I would say somewhere around seven-thirty in the evening.

Q. What, if anything, had happened to the cofferdam that had been put in that 250 feet up from the break?

A. The cofferdam was out at the time the water came over. The water was coming over the cofferdam.

Q. Are you able to state about the height to which the fill had been raised at the time the water went over it?

A. No, that is pretty hard to say exactly where

(Testimony of Hubert F. Terhune.)

the fill was at at the time the water went over, because we had—The bottom of the ditch, if it had stood when we brought the grade up, was much lower than the bottom of the ditch as it should have been. We had a bank approximately ten or twelve feet up above the bottom of the ditch at that time.

Q. And, as I understand, you are unable to state how the bottom of the ditch as it stood then compared with the bottom of the normal grade of the canal?

A. No, it would have been hard to have said where the bottom grade of the canal should have been.

Q. Was the bottom of the canal there higher or lower than the normal grade?

A. It was lower, much lower, than the normal grade would have [164] been of the bottom.

Q. Would you be able to make an estimate of the number of feet lower?

A. Well, not accurately, but I would say it was at least two or three feet below, anyway, the bottom grade—that is, the true bottom grade of the canal as it should be.

The Court: At this time we will suspend for a few moments.

(Short recess.)

Mr. Lytle: May I have the last question and answer, Mr. Reporter?

The Court: Yes.

(Testimony of Hubert F. Terhune.)

(The last question and the answer thereto were thereupon read.)

Q. (By Mr. Lytle): Along that section of the canal which you said was lower than the normal grade of the bottom of the canal, what fill or dirt was put into that section?

A. That was the dirt that was pushed off of the bank side over into the canal by the Reclamation's own bulldozer.

Q. Was that the dirt that you have heretofore stated was just in there in its loose state as it fell?

A. That is right.

Q. I have here two pictures, Plaintiffs' Exhibits 28 and 29. Those pictures purport to show——

A. Well, No. 28——

Q. Just a minute, Mr. Terhune. ——those pictures purport to [165] show the condition following the first break. Do you recognize the locale?

A. No. 28 appears to be just upstream from the break, as there is a little waterfall there or a shelf that had washed that very favorably compares with the little shelf that was there when I arrived there.

Q. And 29?

A. And 29 shows to be opposite the break, showing mostly the bank side and not the fill side of the canal, I would say almost opposite the break and just below this little waterfall, or just downstream from this little waterfall, possibly 75 feet or less.

Q. Referring again to 29, that fault or sort of stair steps in the bottom, does that indicate the stratum that you described earlier in your testimony?

(Testimony of Hubert F. Terhune.)

A. I would say it does. It looks very similar to the strata of material that I was trying to define.

Q. On 28 does that disclose the type and nature of the hillside bank and bottom of the canal?

A. Yes, to an extent. The bottom is pretty well covered with water here and it doesn't show much of the bottom formation, but what little you can see of the bank formation looks similar to the bank formation.

Q. And can you tell us what the bank formation was at that point? [166]

A. Well, on the bank side you had your silt and soil, and so on and so forth, on top, and then as you came down you would get your stratas of hardpan, as you came on down you would hit those stratas of sandstone.

Q. And between the strata of hard sandstone, what was that?

A. Well, I didn't examine that particularly, but it looked more or less like a kind of a sandy-natured soil, and then as you came on down you come to your brown sandstone.

Q. Did those strata of what you called the hardpan contain any gravel?

A. I couldn't say whether they did or not.

Q. Very well. Can you take either 28 or 29 and show where you cut the trench or key for the core?

A. Well, no, not hardly, because 29 comes closest to it, but that section of bank which you can see is washed here, was all washed away, and the core trench would have been partly in this section of

(Testimony of Hubert F. Terhune.)

bank here that is still standing. That was pretty badly washed. And on 29—I would say you really couldn't show the location of the core trench on either 28 or 29, any more than just the—No, I don't believe you can show in those two photographs.

Q. Where was that core with respect to the slope of the outer bank?

A. Of the outer bank? From the toe of the outer bank?

Q. That is, the canal slope of the outer bank?

A. Inside the ditch, or outside? That is, from the inside of the canal or the outside toe of the canal?

Q. Well, I am just asking where it was with respect to the canal slope on the outside bank?

A. Well, it was possibly——

Q. Just your estimate on that?

A. I would say 40 feet from center line of the canal outward.

Q. Then that would take it——

A. That would place it under the embankment at perhaps—It perhaps would be about centered under the top of the embankment as it now stands, or as it stood when we left it.

Q. Yes. With respect to both Exhibits 28 and 29—Strike 28. With respect to Exhibit No. 29, would the core which was put in at the time of the repair following the first break be further in the foreground of that picture or is it within the picture itself, about the point?

A. I presume it probably would be in the picture at that point. It looks like that this photograph probably takes in enough area to give you between

(Testimony of Hubert F. Terhune.)

39 and 49 feet from the center line of the ditch, which would catch the core, perhaps.

Q. And, referring again to 29——

The Court: You mean 28?

Mr. Lytle: 28, your Honor, yes—at the top of what appears to be the outer bank of the canal shows a light area. What is that? [168]

A. That is what I don't know either.

Q. Is that the roadway on the top?

A. That would be the roadway, but what makes it show up so white I don't understand. I notice it shows up almost like snow on here.

Q. And below that white area there is exposed quite an area of ditch bank. Was there any evidence of any core in that old bank?

A. No, sir, not where we were.

Q. And does that disclose the area in which you made your key or slot for the core?

A. Well, I presume it would. When you removed this spoil bank here that is partly washed, the core would be right under that location, because this shows approximately the entire road on top, which would be somewhere near where the core would be.

Q. Will you state again—That is all with that exhibit.

Mr. Hess: May we see this exhibit, please? I just want to identify it.

The Court: Go ahead.

Q. (By Mr. Lytle): Will you state again the width of the cut or wash made there by the water as a result of the first break?

(Testimony of Hubert F. Terhune.)

A. I would say perhaps about 15 feet wide or so at the bottom and about 50 or 60 feet wide at the top.

Q. How far back on the downstream side from the break did you [169] work in making the fill for repair?

A. Possibly—Possibly 50 feet, 40 to 50 feet, on the downstream bank was removed.

Q. Did you remove the top of that bank?

A. The entire bank.

Q. Who designated the point at which you should start removing—or, rather, at which you should end removing from the break? A. Mr. Gordon.

Q. Then how about on the upstream side?

A. The same is true there. Mr. Gordon determined when enough material had been removed that the bank was satisfactory.

Q. As you made that fill, just describe your mode of operation, Mr. Terhune.

A. Well, the particular fill, as it was constructed—and of course I only played one part in the actual construction of the fill. The work that I actually done was providing the earth, mostly, that was taken out of the old spoil bank up onto the new bank, while the other tractor was working on top, placing rock and spreading out the dirt that I shoved up, was the particular job at the time.

Q. Will you explain what you mean by “spoil bank”?

A. Well, it was material that was taken out of

(Testimony of Hubert F. Terhune.)

the old ditch bank and placed in the break so as to have it a return for the ditch bank as we piled it up.

Q. You just took it out and stock-piled it? [170]

A. And stock-piled it, that is right.

Q. And your operation would be just what?

A. I was mostly shoving up out of this spoil bank, and the other 'dozer was working on top.

Q. And what 'dozer was working on top?

A. The Clowers Brothers' bulldozer.

Q. Was that dry or wet material in the stock pile?

A. The stock pile was pretty well dried out to a point to where for compaction purposes, why, it looked like it was almost perfect.

Q. You would 'doze it up on top of the fill and then, as I understand, Mr. Clowers' outfit would spread it?

A. Spread it out and mix it with the rock that the trucks were hauling in.

Q. And would any compaction other than the traffic of the machinery itself——

A. That is right, no other compaction there except the traffic of the machinery working there.

Q. On this night before the second break I believe you stated the water came down into the canal along where you were working?

A. Yes, sir.

Q. Was the canal at that time without sufficient freeboard to carry the water?

A. That is a question that I don't believe I could

(Testimony of Hubert F. Terhune.)

answer, because, not knowing how high the bank was actually above the [171] bottom grade of the canal, I wouldn't have any way of knowing exactly what——

Q. It didn't carry the water?

A. It didn't carry the water.

Q. What happened?

A. It went over the top of the place where we were clearing.

Q. At that time was the new fill all on a level or even grade?

A. Supposedly a reasonably even grade, yes, perhaps a reasonably grade, across the top.

Q. Both at the downstream and the upstream ends?

A. Both at the downstream and the upstream ends. While the downstream end did have some material in on the end that had been piled by the trucks, and so on and so forth, the general contour of the grade was on a fairly even grade and, due to the topping of the water, did not appear to be not to exceed three or four inches lower on the downstream end, as the water was a little heavier on the downstream end by perhaps three and not to exceed four inches.

Q. To what depth did the water go over——

A. I would say to a depth of about three to four inches.

Q. What steps were taken to stop that flow?

A. There was one cat up on the top on the downstream side, and he made an attempt to try to push

(Testimony of Hubert F. Terhune.)

dirt across to build up the bank a little higher, but it didn't work out very well, as there was only one cat up at that particular time. [172]

Q. Where was your cat?

A. I had already shut down and was getting ready to go home at the time that the water was coming over the top.

Q. Where was your cat?

A. It was down over the bank—It would be the downstream side from the break—and it was probably setting off from the break about a hundred yards to where I was doing my service work.

Q. How far from the canal itself?

A. Possibly a hundred feet from the toe of the canal slope.

Q. Assuming that the canal was running north, then that would be a hundred feet east of the toe?

A. That would be a hundred feet east from the canal bank toe.

Q. Had you observed that wash in the land below the canal? A. I did.

Q. Where was your cat 'dozer with relation to that wash?

A. I would say about three hundred feet—if the canal was running north there, it would be north of the canal or downstream from the break and about a hundred feet east from the toe of the canal bank was where I was servicing.

Q. Did you experience any difficulty there in connection with your cat?

(Testimony of Hubert F. Terhune.)

A. Well, of course, as soon as the water started over, I had just completed servicing, and of course I immediately started up, and I believe Mr. Gordon was right there, too, and I think [173] we—I believe he told me to try to make the upstream side of the bank, and I immediately started up and crossed over on the slope of the canal bank that we had in, where the water was running over, up through the water and went on across and perhaps got 50 feet away from the wash, after crossing it, on the upstream side, and bogged down, was stuck there.

Q. Now, were you stuck on the canal or away from it?

A. I was probably 50 feet, if the canal runs north, east of the canal bank, the toe of the canal bank—I was probably 50 feet off of the bank and possibly 50 feet from the wash, which would be south according to the canal running north.

Q. Had any of the water that was escaping from the canal at that time been on this spot?

A. No, there hadn't.

Q. What caused you to get stuck?

A. It was soft. It appeared to be very wet.

Q. I call your attention to a drawing or tracing on the board, which is Plaintiffs' Exhibit No. 82, and ask you if you recognize that part of the drawing indicated as the wash?

A. That would be the washout there (indicating)?

Q. Yes. A. I do.

Q. Mr. Bailiff, is there a pencil there?

(Testimony of Hubert F. Terhune.)

The Witness: I have one right here.

The Clerk: Here. (Hands a pencil to the witness.) [174]

Q. (By Mr. Lytle): Can you indicate on that exhibit about where your tractor 'dozer was stuck?

A. The scale of this is one inch to 50 feet, is that right? It says here on the map, "Canal Bank Road"— —

Q. And just put a cross with your initials.

(The witness thereupon marked upon Plaintiffs' Exhibit 80 as directed by counsel.)

Q. You may leave that pencil right on the rail. Did you observe any trees along the canal on the valley side?

A. Yes, I believe there's two cottonwoods still standing there, although we did knock out, even, one or two small cottonwoods.

Q. Can you state whether or not there is one on either side of the place where the break occurred?

A. There was at the time that I left there, yes, sir.

Q. Yes. Where was your tractor 'dozer with relation to either one or the other of those trees?

A. When it was stuck?

Q. Yes.

A. It probably would have been a little bit south and east of the tree on the upstream side of the break. I don't actually recall the tree in connection with being stuck, but the location, as I remember, of

(Testimony of Hubert F. Terhune.)

the tree is where I would place it, about, at this moment.

Q. Now, after Mr. Clowers' outfit had endeavored to stop the [175] flow of water by spreading earth on top of the fill did he have any success in stopping the water with that operation?

A. No, sir, he did not.

Q. What then did he do?

A. They went up to the cofferdam and started to plug that back so that we would have a cofferdam across and shut the flow of water off.

Q. Who do you mean by "they"?

A. Mr. Clowers, Clowers Brothers.

Q. They did that?

A. That is right.

Q. Just what did they do with respect to that cofferdam? What was their operation? Where did they get the earth?

A. The earth came out of the original old fill bank which was on that side, which was quite high, and by working out of the side of that bank they managed to get material close by to plug the cofferdam.

Q. Were they successful in that operation?

A. Yes, they were.

Q. As a result of the work at that point were they able to plug the canal so as to stop the water coming in at that section?

A. That is right.

Q. About how much freeboard did that have?

(Testimony of Hubert F. Terhune.)

A. As they replaced the cofferdam, how much freeboard was [176] on it?

Q. Pardon?

A. Do you mean as they replaced the cofferdam, how much was the freeboard?

Q. Yes, after they quit work on it?

A. Oh, possibly not to exceed two or three feet.

Q. Then what became of the water on the downstream side of this plug?

A. It continued to flow over the bank for quite some little time until that point of the operation is where my rig got back up on top and the two of us started to building the dike up, which we soon had it stopped going over the top.

Q. Did it flow and drain on down through the canal?

A. Well, there was quite a large volume of water stayed right there in the canal right opposite the break while we were working.

Q. From the time the water was plugged in the canal, from that time on how long were you there?

A. I stayed there until about twelve-thirty, I would say. That would be twelve-thirty a.m.

Q. Yes. About what time was it when Clowers succeeded in plugging the canal on the upstream side?

A. Well, it seems to me like that it should have been, according to the time of year it was—I don't believe it was very dark yet. It seems to me like it was halfway [177] reasonably light, although it was

(Testimony of Hubert F. Terhune.)

getting dusk—I would think it would have been about nine-thirty.

Q. How long after he had plugged the canal did the water continue to run over the fill at the point of the subsequent break?

A. I don't believe it continued to run over more than an hour afterwards, if quite that long.

Q. During the hour had you and Clowers continued to build up the fill?

A. That is right; we continued to build up from—I continued to build up on the fill until I went home at twelve-thirty, or about there.

Q. During all that period of time had water remained in the canal?

A. That is right.

Q. Below the plug?

A. Yes, sir, below the cofferdam; in other words, opposite the place that we were working.

Q. Did the surface level of the water below the plug appear to be lower or did it stand at about the same level?

A. It stood at about the same level, as near as I could tell in darkness.

Q. Do you know what caused that?

A. No, sir, I don't.

Q. You mentioned earlier in your examination that the [178] operator of the Reclamation Service cat came from the hill or mountain side of the ditch down into the canal.

A. Yes, sir.

Q. How long have you operated machinery of this type?

(Testimony of Hubert F. Terhune.)

A. I have spent about twenty-four years at it.

Q. I presume that during that period of time you have operated over all sorts and types of terrain?

A. That is right, sir.

Q. From your experience in operating machinery of this type, can you say whether or not one coming down a slope as steep as the slope on the hillside bank of the canal would come down free or would come down with a load to retard his progress?

A. That is right, he would probably come down with a load to retard his progress.

Q. If he came down with a load what would happen? Where would that dirt be?

A. That dirt would—he would dispose of it after he got to the bottom of the ditch.

Q. That was about how far below the point of the break?

A. Oh, possibly 150 feet or thereabouts downstream from the break.

Mr. Lytle: I think, your Honor, this would be a good point to break this examination.

The Court: All right. Recess until a quarter of two. [179]

(Whereupon, at 12:05 o'clock p.m., Thursday, June 10, 1948, a recess was had until 1:45 p.m.)

Afternoon Session—1:45 P.M.

HUBERT F. TERHUNE

thereupon resumed the stand as a witness in behalf of the plaintiffs herein and was examined and testified further as follows:

Direct Examination

(Resumed)

Mr. Lytle: May we have the last question and answer read?

The Court: Read it.

(Last question and answer thereto were thereupon read.)

Q. (By Mr. Lytle): At or about that point had there a way been constructed or prepared for coming out of the ditch onto the valley bank?

A. Yes, there had.

Q. In going out of there did they just go up the bank or——

A. They had a sort of ramp cut on an angle going up on the bank. It wasn't a very high bank at that particular point, didn't require too much ramp.

Q. Yes. I believe that a while ago I left your cat stuck in the mud.

A. Yes, sir. [180]

Q. How did you get out of there, or did you get out?

A. Well, we used Mr. Clower's winch truck and with the power of the cat itself and the winch truck we pulled it right straight on ahead through.

(Testimony of Hubert F. Terhune.)

Q. Do you know who it was that assisted in the work of getting your truck out?

A. Did I know the people who assisted?

Q. Yes.

A. No, I wasn't very well acquainted at that time and I can't say that I even knew the very people that helped. I know that it wasn't just the Clowers brothers. It was someone else.

Q. Some people who were there?

A. That is right.

Q. What time did you leave that night after you had put the fill up to the point where no water was running over?

A. I would say about 12:30 a.m.

Q. At that time was the plug on the upstream side of the bank still withholding the flow of the canal?

A. Yes, sir, it was.

Q. Now, with respect to the water in the canal below that plug and along the new fill, about how much freeboard was there at the time you left?

A. At the time I left I would say there was approximately two feet, a little more or less.

Q. Uh, huh. [181]

A. Not to exceed, I would say, two feet and a half, but it would be more than a foot and a half, because we was quite a little ways to water.

Q. When you left did you take your equipment?

A. No; I just parked it down off to the side there.

Q. Did you return the next day?

A. I returned the next day reasonably late—oh,

(Testimony of Hubert F. Terhune.)

I should think probably eight o'clock or eight-thirty next morning.

Q. What was the condition that you found them?

A. There was a hole completely washed through the bank again.

Q. How?

A. There was a hole washed through the bank again on the valley side.

Q. Where was that hole with respect to the hole that had been washed through by the first break?

A. It possibly, from the first break, possibly would have been 75 feet from the first break to the second break.

Q. You mean the hole that was washed?

A. That is right. If I understood the question right, I believe that would be the answer I would give. Do you mean the hole that was washed through the first time?

Q. Yes.

A. And to the hole that was washed through the second time?

Q. Yes.

A. Yes, I would say that there was possibly 75 feet between [182] the two holes.

Q. Taking into consideration the upper side of the hole, that is, the upstream side of the first hole, how far down would you say was the upstream side of the second hole?

A. I don't believe I understand that.

Mr. Lytle: May I have 28? Will you give that to the witness, please.

(Testimony of Hubert F. Terhune.)

Q. Calling your attention again to Plaintiffs' Exhibit No. 28, which depicts the bank, that is, the lower bank of the canal and the upper end or upstream end of the break—now, how far from that point was the upper side of the break?

A. Possibly a distance of 125 feet, I would say, from the top side of this break here to the downstream top side of the bank on the other break.

Q. To the downstream side of the new break?

A. That is right, to the extreme downstream bank that was left standing.

Q. And how wide was that second break?

A. Well, as I recall, it probably was about, oh, ten or twelve feet wide on the bottom, with a slope out on each side to, oh, possibly thirty feet at the top—maybe a little bit more; I would say thirty or thirty-five feet at the top, somewhere around twelve or fifteen at the bottom.

Q. Where was the break with relation to the fill that you had worked on following the first break?

A. Right off of the downstream end, probably within—the center of the break was perhaps within twenty-five feet of the downstream end of our fill.

Q. In doing work on the ditch bank following the first break did you have occasion to drive your cat 'dozer along on top of the bank?

A. Yes, I did.

Q. Did you observe any difference in the fill, the operation of your truck, leaving the old bank as you came onto the new fill?

A. Yes, there was a——

(Testimony of Hubert F. Terhune.)

Q. What was that?

A. There was a soft condition off the downstream side of our fill that we had put in. It was pretty hard to really determine what was happening, because it particularly started being soft that night as we were working in the dark. It was pretty hard to tell exactly, but we could tell that we were hitting soft ground.

Q. When you returned the morning after the second break did you observe whether the new fill was all intact or whether it had been——

A. Yes, I would say that practically all the new fill was intact, with the exception of a little bit of new stuff on top, which you can't compact, which would probably amount to two or three or four inches on top that was gone, but as far [184] as the end, I presume it was reasonably close to the end that we had left on.

Q. Did I understand that this second wash flared from the width at the top to the bottom, how much?

A. I would say about thirty to thirty-five feet at the top to twelve or fifteen at the bottom, just a V-flare.

Q. How far did you work back on the old bank in repairing the second break?

A. On which end? Downstream or——

Q. On the downstream end?

A. The downstream end? We were probably shoving dirt from back a hundred and fifty feet.

Q. How far back did you work on the upstream side of the new break?

(Testimony of Hubert F. Terhune.)

A. Well, I used the carryall in that vicinity after the second break and we went quite a way back, possibly four or five hundred feet, and robbed dirt off of the bank in back in order to bring into the fill.

Q. How far did you cut the new fill back in filling in the second break?

A. I didn't cut any back in the new fill myself personally.

Q. Did you observe——

A. No, I can't say. I can't say exactly what that would be.

Q. You are not in a position to state. In repairing the second break on the downstream side did you cut down on the [185] bank there at or about the point where the first fill had ended?

A. Well, that particularly, as I remember, they were using a dragline there to excavate the bank below the break on the downstream side, and as far as I can remember now I believe all preliminary work was did with the dragline, and consequently I wasn't right there to watch it or didn't know exactly what was taking place.

Q. Did you have any occasion to observe the condition of the soil down there?

A. No, not to the point that I did on the first, original break.

Mr. Lytle: That is all.

Cross-Examination

By Mr. Hess:

Q. As I understand, Mr. Terhune, on the night of

(Testimony of Hubert F. Terhune.)

the 14th—that is when this break first occurred—you arrived there about eleven o'clock with your equipment?

A. I don't know what date it was, sir, but I arrived of a morning about eleven o'clock.

Q. I mean in the morning, yes, eleven in the morning.

A. But I don't know what date in July that was.

Q. Did you understand that that was the first day of the break?

A. I don't believe that I did, no. [186]

Q. You don't know whether it was or was not?

A. I wouldn't say whether it was or was not the first day of the break.

Q. And who was working there when you got there, Mr. Terhune?

A. Well, as I recall, the Clowers brothers were there with their rig, and, if I remember rightly, I believe the Reclamation had their D-7 there and there was a D-4 there—whether it was there at that particular time I couldn't say for sure—and I believe they also had moved in a small dragline. I believe that was on the job at the time I arrived.

Q. And were there a number of men working there with shovels, and things of that nature, by hand?

A. There seemed to be a good many men around, perhaps, in the vicinity, that were hand laborers.

Q. And were they all working, would you say, very diligently to try to get this work accomplished?

A. Well, at that time—at that particular time of the break I guess they were doing the best they

(Testimony of Hubert F. Terhune.)

could. It was kind of haphazard working right at the very time of the beginning, because room was scarce, but I never took any particular notice as to what their particular job was.

Q. But they were working as fast as the job would apparently permit there?

A. I would say that they were progressing, yes.

Q. And you think this gap there, the first break, was about [187] fifteen feet wide, would you say, at the bottom?

A. That is right.

Q. And sixty feet at the top?

A. That is what I would say.

Q. That is, at the first break?

A. That is right.

Q. And you testified that they were moving the loose materials out of the bottom of the canal when you got there?

A. That is right, yes, sir.

Q. And how far upstream from the break were they removing that loose material?

A. I would say about 150 feet.

Q. And down below, downstream?

A. Downstream, possibly not more than fifty feet.

Q. But they were moving that out, too, were they not?

A. That is right.

Q. Cutting as deep for the sort of material that appeared as they could?

A. That is right.

Q. And in the preparation for the making of this fill to repair the break, as I understand it, you cut and excavated a trench?

(Testimony of Hubert F. Terhune.)

A. That is right.

Q. You cut and excavated a trench about how wide in the bottom? [188]

A. It would be thirteen feet, with my 'dozer that I had at that time, on the top.

Q. It was cutting at least that wide?

A. It was cutting at least that wide.

Q. And after they cut all the loose material off how deep were they cutting down in the bank?

A. We cut down, I would say, from two to four feet with the 'dozers.

Q. And from the ends where the break had occurred it was dug out by others that were working on the job—on the lower end you suggested, I think, about fifty feet, was it?

A. I should say about fifty feet on the downstream end.

Q. And then your trench went into that bank?

A. Yes, sir.

Q. And then the trench also went into the upstream bank. They had removed that about how far?

A. I would say about twenty-five or thirty feet upstream.

Q. And it seemed to be good, solid material there? A. It seemed so.

Q. And then you stated that they were taking that material out and building it for a stock pile?

A. Yes, sir.

Q. They were setting it out away from the bank and building it for a stock pile?

(Testimony of Hubert F. Terhune.)

A. Yes, sir. [189]

Q. Then they were hauling in—there was coming in by truck, you described, other material?

A. Yes, sir.

Q. That was gravel material, was it not?

A. Gravel, and some earth, I believe, too.

Q. Gravel and some earth. And you said that the material that had been removed out, by the time that you were putting it back in apparently appeared to you to be perfect material for a mix?

A. That is right.

Q. With the gravel that they were putting in?

A. Yes, sir.

Q. And it was mixed and put in on this trench and in building up the embankment; that is correct, is it not?

A. That is right.

Q. And I will ask, if you will remember, then, your 'dozers moved over the top of this as this would be put in to impact it and pack it down, is that right?

A. Yes, sir.

Q. How many 'dozers were passing back and forth over that?

A. There was one all the time working up on top, and sometimes there were two of us on top.

Q. And how much would those 'dozers weigh?

A. The 'dozers I had at that time and my rig, according to the Army specifications, would weigh about 46,600.

Q. And what would the other weigh? [190]

A. About three tons lighter.

(Testimony of Hubert F. Terhune.)

Q. I will ask you whether or not a cofferdam had been put in and a pump put in and a hose or hoses put down in there, in places where this wasn't compacted too solid—that is, the material—that the hose was used to impact that when you ran over it?

A. They had a pump in upstream and it was setting, as you say, at the cofferdam, and they had a pipe line down, and I would say I don't believe they found it necessary to use it very often, although I believe it was used a few times.

Q. And from your experience it appeared to you that that was a perfect compaction and mixture as it was put in?

A. I would say it was perfect, yes.

Q. And, as you have described it here, in spite of the fact that water flowed over that, when you talk about this overflow, when you worked until something—I believe it was about twelve-thirty, was it, that night?

A. That is right.

Q. —when you got back there the next morning the break—that hadn't caused much breaking or washing away of the top of the embankment that you had put in there; is that right?

A. No, only about three or four inches, which you can't help.

Q. And this other break, you state, was some seventy-five feet below the downstream end of the embankment that had already been put in? [191]

A. No, sir, I didn't say that.

Q. Well, just straighten me out.

A. About twenty-five feet.

(Testimony of Hubert F. Terhune.)

Q. About twenty-five feet; but, in other words, it was no part of the fill that had already been put in? A. I would say no.

Q. And I will ask you this question, whether or not, as that had washed away, the second break, whether or not both ends of your tunnel, that is, on the upstream and lower ends, were not touched—that is, your tunnel on the bottom?

A. I don't believe I get the question.

Q. Trench. I don't mean tunnel. I mean the trench you made.

A. For the core, you mean?

Q. For the core, yes, material.

A. No, sir, there were no indications of it being washed into that.

Q. At no time during the second break?

A. Yes.

Q. It held on both ends?

A. It held on both ends, the dike that we had put in.

Q. Now, then, when you have been talking about core, you are talking about the material that was being used, are you not? That is what you mean?

A. I presume that would be, your term of it would be, the actual core, the material used, not the actual trench dug. [192] The trench would be the trench, and the other core.

Q. Yes. You stayed there for the repair and clear through the repair of the second break?

A. That is right.

(Testimony of Hubert F. Terhune.)

Q. And, of course, after the repair was made of the second break that has at all times held since that time?

A. Yes, that is right, as far as I know.

Q. Now, then, you have located on that map the Caterpillar that was stuck, I believe, by putting your initials "H.T.," I believe, there, Mr. Terhune?

A. Yes.

Q. Would you step down with your pencil and place where you think the tree was, the little tree, whereby the cat was.

A. I don't really exactly connect the tree with being stuck, but I believe the tree would set right about there (indicating), the best that I can remember, in the——

Q. That is right near where your cat was?

A. That is right. I would say I was probably anywhere from twenty-five to fifty away from the tree; I don't believe much further than that.

Q. Yes. You may be seated. And that, as you point out, is a good deal lower down toward the valley than the lateral ditch that was——

A. Yes, that is below a lateral ditch.

Q. It was below the lateral ditch. Now, these little cottonwoods [193] that you speak about, that you mention, some of them undoubtedly have been taken out with your bulldozers?

A. Yes.

Q. That was all below that lateral ditch, wasn't it?

A. No, I believe that I took out about two small cottonwoods that were above the lateral ditch.

(Testimony of Hubert F. Terhune.)

Q. How far above?

A. Oh, I believe it would be about ten or fifteen feet straight in, up the bank.

Q. How big were those trees?

A. Oh, about four inches in diameter, I would say, at the base.

Q. How high?

A. Oh, about ten or twelve feet, something of that nature; fifteen at the most.

Q. But it was in the field where you got stuck?

A. It was in the field where I got stuck, yes, sir.

Q. And that was just a little, as I understand, to the upstream from where the flow had gone through from the first break?

A. That is right, sir.

Q. As I understand, you were, then, not present when the second break actually occurred?

A. Yes.

Q. That your first observation of it was that next morning [194] when you got there on the job?

A. That is right, yes, sir.

Q. This——

The Court: Now, I think there is confusion in the record. As I understand it, there are three breaks, is that correct?

Mr. Hess: Not to our knowledge, your Honor. It is wholly new to me if there were three breaks.

The Court: Well, then I don't understand the testimony. He talks about his not being there at the second break. I thought his testimony here before was that he was there.

(Testimony of Hubert F. Terhune.)

Mr. Hess: Well, if your Honor please, right while it happened. He came there in the morning, as I understand it. As I understand the testimony, there was an overflow of water that came over the top, but nothing broke out, and that wash had been off of the top of the embankment—loose dirt, but nothing more. But this second break——

The Court: Wouldn't you call that a break when it came over the top?

Mr. Hess: Well, the water subsided. There was no break taken out. The water was up, as I understand it, something about eleven feet from the bottom of the break.

The Court: What confused me, the water broke over when he was right there. Now he says he wasn't there at all.

Mr. Lytle: If your Honor pleases, I think this witness——

The Court: After all, this is being done for my edification. [195] I am supposed to understand these facts when I get through, and if I don't understand them I am going to tell you.

Mr. Lytle: I think I could make a statement that would clarify the question.

The Court: All right.

Mr. Lytle: This witness was there the night of the last break until some time after twelve o'clock. Before he left the water in the canal was high enough that it was overflowing the lower bank of the canal. There was no breaking of the structure.

(Testimony of Hubert F. Terhune.)

They stopped the overflowing of the lower bank by building the bank up and they then had a freeboard. After having stopped that water and having the freeboard he then left. Later that night there was a break of the structure.

Mr. Hess: I will just say this—not that structure, but below. He said that he was——

Mr. Lytle: I am talking of the ditch structure.

The Court: I understand all that, but what causes my confusion, you were referring to this break of the structure as the second break. That is what is causing the confusion in my mind. As I understand it, water did break out over there while he was right there.

Mr. Lytle: That is correct.

Mr. P. J. Gallagher: No question about that.

Mr. Hess: Well, that was an overtopping——

The Court: Whatever it was, the water flowed out of the [196] canal in a way that it was not supposed to flow out.

Mr. P. J. Gallagher: That is correct.

Mr. Hess: I think that is correct.

The Court: It flowed over the top, and I would consider that a break, but everybody seems to be against me, so I adopt your ideas on that.

Mr. P. J. Gallagher: No, your Honor, I am with you on that. I think there were three—there were three distinct escapes of water from the canal.

Mr. Hess: I guess we had better have a new pre-trial order, then, agreeing to Pat's theory. We claim two breaks in the pre-trial orders. But, in any

(Testimony of Hubert F. Terhune.)

event, as an operator there in repairing this matter you regarded those as two breaks in the canal?

A. That is the way I termed it. I didn't connect the overflow as a break. I just termed that as an overflow. But the second break in the canal, that is what I termed as a second break.

Mr. Hess: I think that is clear to the Court?

The Court: Yes.

Q. (By Mr. Hess): You made some statement relative to that you had not observed any evidence of core in the bank. What did you mean by that?

A. There was no indication, when we started the excavation for the core bank in the sandstone material, that there had [197] ever been a core bank there before in any part of it, because we cored back beyond the washes on each side.

Q. I see. Well, these places where the breaks occurred were what is commonly known in construction work—that is in a cut, rather than a fill?

A. Well, sir, you can't determine that now from the lay of the ground. To look at the ground as it is and to look at the break as it came out, it would show to appear to any person that just observed it that way and not seeing it before that it was a surface bank, and, in other words, it was not a thorough cut, to look at it today. When the break happened—that is, I looked at it when the break happened and it did not appear to be a thorough cut.

Q. Ordinarily, then, what you call a cut is where a high piece of ground will be cut off or where a

(Testimony of Hubert F. Terhune.)

road or other excavation is made in the side of the mountain, you would cut that?

A. We call that a cut, yes.

Q. And the fills are where you take the materials, ordinarily, and build up the depressions and vales?

A. That is right. What I believe a thorough cut in construction is is where a cut goes clear through both banks.

Q. But, in any event, this is a cut in as far as the upper embankment is concerned?

A. It is a cut, definitely, as far as the upper embankment. [198]

Q. It is fully and completely a cut as to that?

A. That is right.

Q. And on the lower embankment, what you mean by that is you can't tell whether it was a partial cut or not?

A. No, you couldn't tell.

Q. And that is what you mean when you say that you did not observe any evidence of a core bank being made?

A. That is right.

Q. Or, in other words, a trench being made and the bank built up at this patch?

A. That is right.

Q. That is what you mean by that?

A. That is right.

Q. When you were working there on this you stated, in terms of hours that you had worked, that you put in some ten hours, I believe you stated, regularly?

(Testimony of Hubert F. Terhune.)

A. I stated about twelve, I believe, generally speaking.

Q. But you worked as much as two and sometimes three shifts a day?

A. Yes, that is——

Q. According to when the engineer felt that it was more necessary that your equipment was operating?

A. That is right.

Q. And you were there and did do that?

A. Yes, I worked more or less as he felt that I should. [199]

Q. Now, then, in the lower part of the canal, after the—when you were working on the embankment, we will take for what you designated as the first break, one of the 'dozers, after all this material had been cleaned out of the bottom and it had been scraped thoroughly and that loose material taken out, a 'dozer for the Government or for the Department was working on top and putting material into the bottom of the canal; is that correct?

A. Yes, sir.

Q. Putting silt in the bottom of the canal. And while you were working there, while all these people were working there, Mr. Grant Gordon, whom you have identified here, this engineer, was there at all times directing that work, was he not?

A. I would say he was there at all times when I was.

Q. And also part of the time Mr. Spofford was there with him?

A. That is right, sir.

(Testimony of Hubert F. Terhune.)

Q. You have done a great deal of construction work, have you not, heavy construction, in your period of time? A. Yes, sir, a great deal.

Q. You have worked on highways, railroad construction, airports—— A. Yes, sir.

Q. ——and earth-filled dams for water reservoirs? A. Yes, sir.

Q. And things of that sort? [200]

A. Yes, sir.

Q. That has been your work? A. Yes, sir.

Q. And I will ask you if, in your opinion, everything was being done from an engineering standpoint and from a workman's standpoint to repair that or both of those breaks thoroughly and with all speed possible under the circumstances?

Mr. P. J. Gallagher: That is objected to as calling for a conclusion of the witness.

The Court: Just a moment.

Mr. P. J. Gallagher: That is objected to as calling for a conclusion of the witness.

The Court: No, I don't think that is objectionable. I think it is not proper cross-examination.

Mr. P. J. Gallagher: We kept clear away from expert questions on direct.

The Court: You did not ask him any expert questions on direct and it is not proper cross-examination to ask him that. You can on your case in chief call experts of your own to testify to that if you want to.

Mr. Hess: Yes, your Honor.

(Testimony of Hubert F. Terhune.)

Q. You spoke something about that a tractor coming down the bank from the upper side would ordinarily be carrying a load to hold it back.

A. Yes. [201]

Q. Did you see any material that was in any load coming down the bank?

A. I wasn't watching the tractor at the time. I just stated how a tractor would come down.

Q. How it would come down? A. Yes.

Q. You don't know whether it did come down that way or what happened?

A. Well, if it didn't come down that way it would stand a chance of turning over down the bank.

Q. But you don't know how many times he did come up and down?

A. Well, I saw him come up once and come down once.

Q. But you didn't know whether he had any material?

A. I didn't know whether he had any material.

Q. As I understand, you had built up the top—that is, the water was down below the top of the bank on the first fill before you left that night?

A. Yes, sir.

Q. And how far did you say?

A. I would say about two feet.

Q. It could have been lower than that, could it not?

(Testimony of Hubert F. Terhune.)

A. You mean the bank could have been lower than that?

Q. No, I mean the water could have been lower than that?

A. Well, it possibly could have been two feet and a half, but I don't believe it was. Two feet would be my—— [202]

Q. You observed that yourself?

A. Yes, sir.

Mr. Hess: I believe that is all, Mr. Terhune.

Mr. P. J. Gallagher: Just a second.

Redirect Examination

By Mr. Lytle:

Q. How far on the downstream side of the canal were they removing loose material from the bottom of the canal?

A. In regards to the first break, or the second break, or what?

Q. Following the first break?

A. In the first break? The downstream side, I will presume about fifty feet, and a little excavation around one corner on the inside next to the water was did with a dragline for possibly, oh, an additional maybe—it might have been twenty-five feet around on the inside bank that was soggy.

Q. Now, how far downstream from the center of that first break was the core built?

A. How far downstream? It would be built to the entire end of the tractor excavation, which would have been about fifty feet.

Q. Do I understand that that fifty feet would

(Testimony of Hubert F. Terhune.)

be the entire length of the core? A. No, sir.

Q. Well, what was it? [203]

A. That would be the downstream side from about the center line of the break, then you will core back on the upstream side to probably thirty feet, thirty-five feet, something like that, from the center of the first break.

Q. And the second break occurred, as I understand you, below the lower end of that core?

A. That is right.

Q. About how far would you say?

A. I would say that about twenty-five feet would have been the center of the break.

Q. Well, there was some discussion with respect to whether this was a cut or a fill, and the upper or hillside bank was cut into the bank, as I understand it? A. Yes, sir.

Q. Then did you have to borrow the material to build the lower bank?

A. I don't believe I can understand. I believe I stated that the material that we used was what we dug out from the spoil bank and imported material that was brought in from various locations.

Q. Yes. In other words, there had to be material brought in from some source?

A. That is right. We also used material from the top of the ditch bank, particularly on the upstream.

Mr. Lytle: There is one question, your Honor, that I [204] should probably have asked this witness on direct examination. May I do so?

(Testimony of Hubert F. Terhune.)

The Court: Yes.

Q. (By Mr. Lytle): While you were there working the night prior to the first break—or the second break, did you hear Mr. Gordon or any other person there in charge of the work direct any of the workmen to go up the canal and do something with respect to the water?

A. No, sir, I did not.

Q. You didn't hear that? A. No, sir.

Mr. Lytle: That is all.

Mr. Hess: That is all, Mr. Terhune.

(Witness excused.)

Mr. P. J. Gallagher: Dean Johnston. [205]

DEAN M. JOHNSTON

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: What is your name, please?

A. Dean M. Johnston.

The Clerk: Dean Johnston?

A. Yes, sir.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. Where do you live now, Mr. Johnston?

A. Twin Falls.

(Testimony of Dean M. Johnston.)

Q. And what is your occupation or business?

A. Construction foreman.

Q. Construction foreman?

A. That is right.

Q. On account of the fan going, will you speak a little louder. You formerly lived in Malheur County?

A. Yes.

Q. And were you formerly connected with the Reclamation Bureau?

A. Yes.

Q. Over what period of time?

A. Oh, I started to work in February, 1934.

Q. And what was your position at that time?

A. I started to work as a rodman.

Mr. Hess: I can hardly hear.

A. Started to work as a rodman.

Q. (By Mr. Gallagher): In the field?

A. Yes, sir.

Q. How long did you continue with them, Mr. Johnston?

A. Oh, I had two interruptions. When I went to college was one of them, and I continued—I started in February of '34 and worked until March 17th of '35, and then I went to school, then came back in June and worked until September, then I went to college another year and back and went to work in June and stayed employed until, oh, '46, I think it was.

Q. What I am going to ask you about, were you doing field work at the time this section of the canal was built along Mile Post 36 on the North Canal?

(Testimony of Dean M. Johnston.)

A. I was working on a survey party with Mr. Frizzel and Doolittle and Savage, I think.

Q. Did you have an opportunity to observe whether or not the construction of the canal at the point where it broke in '46, whether or not there was any core wall built in the lower canal line there at that time?

A. Well, that depends. The core line—now, there's no profile and slope sections that determine that, whether there was a core wall or not established there at that time. If the canal, in other words, due to the contour of the hill—[207] If the canal was—we tried to always locate the canal so that the lower embankment would be at water level a thorough cut.

Mr. Hess: Now, we move to strike that answer out as not responsive and this man not shown himself to be qualified to give that sort of an opinion.

Mr. P. J. Gallagher: Well, he hasn't finished the answer yet.

The Court: Yes, I think he has finished a sufficient portion of the answer so I can rule, and I will strike it out. He is talking about something that he was not asked about and likewise something that hasn't anything to do with this case, that they always did certain things. I am not interested in what they always did. I want to know what they did in this instance.

Mr. Hess: If the Court please, may we ask that the witness speak a little louder. We can't get his answers down here at all.

(Testimony of Dean M. Johnston.)

The Court: I don't really think I need to say anything. Go ahead.

Q. (By Mr. P. J. Gallagher): Dean, what I want to ask you is whether you know anything about—that is, of your own knowledge—whether or not there was a core wall built into the lower side of this bank over the area where the break finally occurred during the course of the construction? Is that, plain [208] to you?

A. Well, as to that particular location, there was a lot of canal out there when I was working during construction, and I couldn't say, I wouldn't like to say. The original survey would have to show.

Q. Well, if you don't know, why, you don't know.

A. No.

Q. Do you know where the break actually happened?

A. Yes, in the general vicinity. I was there at the time of the first break, just for a few minutes, walked up more or less for curiosity. I wasn't working on it.

Q. Do you have any recollection at all how that would enable you to testify as to whether or not in the construction of that particular piece of canal bank a core wall was built in?

Mr. Hess: Now, just a minute. He has already answered that question and he said he didn't know.

The Court: Well, he can ask the question.

A. Well, that question—at the time of the con-

(Testimony of Dean M. Johnston.)

struction there of that particular section of canal the contractor pioneered a road through there on center line for his big machine to come in there and excavate with a small Lorain shovel——

Mr. Hess: Now, we move to strike that as not responsive to the question, your Honor, and the witness not having shown himself to be qualified.

The Court: I don't think it has anything to do with qualification. I am not sure whether he is testifying from something he saw or heard, or anything of the sort. If he knows anything about this situation, why, he can testify to what he saw and what he observed at the time of construction, but that is all he can testify. I strike this present answer.

Q. (By Mr. P. J. Gallagher): Dean, do you understand what I am trying to ask you at all?

A. You wanted to know whether there was a core wall there.

Q. That is what I wanted to know.

A. Well, that can't be answered—I cannot answer whether there was a core wall there. I do know that the contractor pioneered a road. In other words, due to the contour of the hill he had to pioneer a road with a smaller machine to excavate there, and I know that was done because we went in there with a survey crew to get up to the line section where the machine was coming back on excavation.

Q. Now, did that have anything to do with

(Testimony of Dean M. Johnston.)

whether or not a core wall was built or was not built?

Mr. Hess: We object to that as not showing whether or not this man is qualified to answer the question.

The Court: No, this relates to observation. He answered it as though he thought it had something to do with it. What do you think it had to do with it?

A. Well, gentlemen, I have explained to you that the specifications—— [210]

Q. (By Mr. P. J. Gallagher): No, I don't care anything about specifications. You know what a core wall is? A. That is right.

Q. Now, if you don't know whether a core wall was built in there, all you have to do is to say you don't know. A. I don't know.

Mr. P. J. Gallagher: That will be all, then.

The Court: Cross-examination?

Mr. Hess: No cross-examination.

The Court: You are excused.

(Witness excused.)

Mr. P. J. Gallagher: If your Honor please, this testimony will be rather long and will involve examination of some number of witnesses, and if we may have about three minutes to pick out some exhibits it will probably save time.

The Court: Take a few minutes recess.

(Short recess.)

Mr. Lytle: We will call Mr. Merritt. [211]

ALLEN C. MERRITT

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

A. Allen C. Merritt.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Lytle:

Q. Where do you reside, Mr. Merritt?

A. At Boise, Idaho.

Q. How old are you?

A. Seventy years old.

Q. How long have you resided in Boise?

A. About eight years.

Q. Where did you reside prior to that time?

A. Salmon, Idaho.

Q. And how many years in that area?

A. I resided there from 1883 until 1938, and then I moved to Boise and back to Salmon and later to Boise.

Q. What is your occupation?

A. I am a civil and mining engineer.

Q. Where did you take your preliminary training?

A. Well, I have worked at the engineering business since I was a very young man, working in engineer crews, and later in charge of various types of work, various lines of construction [212] and design.

(Testimony of Allen C. Merritt.)

Q. And over a period of how many years have you been so engaged?

A. I would say fifty years actively.

Q. Will you state some of the works you have been on over the past few years?

A. Since 1943 I have been engaged in general civil and mining engineering practice with Mr. Raymond J. Briggs, of Boise, as associate engineer. Prior to that time I held the position of Commissioner of Public Works of Idaho for two years, and I practiced for two years previous to that, and previous to that time I also held the same position during 1938. Prior to that time I was engaged in various activities involving engineering work of different types.

Q. In the course of your experience have you had work in connection with any irrigation project?

A. Beginning in the early 1900s I spent a great deal of time investigating the water resources of several Northwest states, mostly on my own account, but in conjunction with the U. S. Geological Survey, in making stream measurements and a number of reports on various irrigation projects throughout the Northwest, beginning with 1904.

Q. In the course of your work have you found it necessary and have you from time to time made studies of geological formations? [213]

A. Oh, yes.

Q. Have you become acquainted with what has

(Testimony of Allen C. Merritt.)

been designated in this case as the North Canal of the Owyhee Project?

A. Yes, sir, I have looked it over, a part of it.

Q. Yes. When did you first go out to look over any part of this project?

A. I believe it was about the 8th—6th or 8th day of March that I went out to look at the——

Q. Of this year?

A. Of this year, yes, sir.

Q. Who, if anyone, accompanied you the first time?

A. Well, I believe there were three gentlemen representing the water users, and Mr. Gallagher, I believe, was in the party, and two—three of my associates were along.

Q. And who were your associates that accompanied you?

A. Mr. Briggs, Mr. Bouton, Mr. Karsten Bronken were three of them that were present at that time.

Q. Do you recall the names of any of the gentlemen who were with Mr. Gallagher?

A. Well, I can't recall their names. I can recognize them, but I don't remember their names.

Q. Do you recall the name of one as Mr. Jerry Sproul?

A. Yes, I believe I do.

Mr. P. J. Gallagher: Mr. Sproul, will you stand?

(Mr. Sproul, in the audience, here arose to his feet.)

(Testimony of Allen C. Merritt.)

A. That is the gentleman, yes, sir.

Q. Is that one of the gentlemen who accompanied you? A. Yes, sir.

Mr. P. J. Gallagher: Will Mr. Finley stand, please?

(A gentleman in the audience here arose to his feet.)

A. Yes, I recognize Mr. Finley.

Q. Where on this project at that time did you go, Mr. Merritt?

A. Well, we went up, I think, what is called King's Lane and which extended west up to the bank of the canal, followed the bank of the canal from the point where King's Lane intersects it along to a point, oh, somewhat above the cattle guard, for some distance, and then we traveled along the bank of the canal for some considerable distance and returned to the highway over another route. I am not able to name that route.

Q. Did you stop on that occasion to make any investigation or exploration? A. Yes, sir.

Q. Where on the project or on the canal did you stop?

A. At a point about 600 feet or such a matter north of the cattle guard we stopped and examined the point that had been broken and repaired there, where the bank of the canal had been washed out and repaired.

Q. Were there any physical evidences there that would enable [215] you to determine from observation that there had been a break and a repair?

(Testimony of Allen C. Merritt.)

A. Oh, yes, there was ample evidence of such.

Q. What were those indications?

A. There was quite a distinct wash in the surface of the soil that had been taken out, in below the point where the break had occurred, washed down to the supporting formation, washed the earth off.

Q. Were there any evidences on the other bank of the canal which would indicate recent work?

A. Yes, it was quite noticeable. The canal had been rip-rapped or surfaced with a mixture of gravel and earth to protect it or stabilize it for some distance along the bank of the canal, and of course immediately below that same point there was an embankment that supported the bank of the canal, a sort of a road along over it, which I presume was put in as a foundation to support the bank that was replaced.

Q. Were you here when Mr. Sproul was on the witness stand? A. Yes, sir.

Q. Are you able to identify the place to which he stated that he conducted you that day as the place which you investigated? A. Oh, yes.

Q. Now, that was at what time, Mr. Merritt? March what?

A. I think that was March 7th or 8th; 8th, I guess that was. [216] I believe it was the 8th. I don't recall.

Q. Were you again at this point?

A. Yes, sir, I returned to that point.

Q. When did you return?

(Testimony of Allen C. Merritt.)

A. I am not positive that I can give the exact date. It was along in the latter days of March, perhaps the 24th, 25th, 26th or 27th, about that date.

Q. Yes. Were you later at the point again?

A. Yes, sir.

Q. And when was that?

A. I was there April 1st.

Q. And at any other time?

A. I was there again on the 19th of May.

Q. When you were there on the 7th or 8th of March of 1948 how much time did you put in on that occasion?

A. Well, we were there several hours, looking over the canal and the evidences of the break.

Q. When you were there on the 7th or 8th of March of 1948, was there water in the canal?

A. No, the canal was dry.

Q. On that occasion did you and your associates make a study of the entire surrounding area as well?

A. To a certain extent, but we did that more thoroughly at a later date.

Q. At what time was that? [217]

A. I think it was about the 26th or 27th of March.

Q. When you were there on the 26th or 27th of March was there any water in the canal?

A. No.

Q. And how much time did you put in there on that occasion?

(Testimony of Allen C. Merritt.)

A. Well, I think we were there a good part of half a day, walking over and examining the surface in the vicinity and above the canal, and below the canal in the fields, and along the bank of the canal.

Q. Who accompanied you on the trip the latter part of March?

A. Mr. Bouton and Mr. Bronken, Karsten Bronken.

Q. At the time you were there on the 1st of April was there water in the canal, as you recall it?

A. No, sir, there was not.

Q. Who accompanied you at that time?

A. Mr. Paul Bronken, Mr. Bouton, Mr. Riggs, and Karsten Bronken were all present.

Q. About how much time did you devote on that occasion?

A. We arrived there about nine-thirty in the morning and left there a little before one o'clock, possibly about one o'clock.

Q. And on the 19th of May, when you were there, who accompanied you?

A. Mr. Bronken, Paul Bronken.

Q. You and he alone? A. Yes. [218]

Q. Now, on one of these occasions did you take some pictures of the area and different aspects of the area and the ditch and surrounding conditions?

A. Yes, sir.

Q. On what occasion was that? What trip was that?

A. On May 1st—or April 1st, I should say, I

(Testimony of Allen C. Merritt.)

took seven, made some exposures, seven photographic exposures.

Q. And then did you at another time take some?

A. Yes, later, when I came on at the 19th of May, I took some more.

Q. On the 19th of May was there water in the ditch? A. Yes, sir.

Q. In April of 1948, when you were there, did you take some photographs of the ditch itself?

A. Yes, sir.

Q. From the condition as you observed in the ditch at the time the photographs were taken, particularly with reference to the mountain or hill side of the canal, would you say there had been any material change in that formation over a period of many years?

Mr. Veeder: I object, your Honor, as the witness not having been qualified as an expert in geology.

The Court: Objection sustained.

Q. (By Mr. Lytle): In the course of your work over a period of years, what work involving the study and the practice with [219] relation to geological questions have you had?

A. Well, I have made a number of studies, geological studies, of the various rock formations of different sections of the country, comparing them with the reports of geologists and others acquainted with those subjects, identifying the various layers of stratification and other geological features.

(Testimony of Allen C. Merritt.)

Q. Did your duties in your official capacity with the State of Idaho require work in that line?

A. On numerous occasions, yes.

Q. What, in general, would that be?

A. Location of highways and drainage structures and drainage in connection with highway construction, a very common problem.

Q. Over a period of how many years have you had work involving geology and geological formations?

A. Well, I would say thirty-five or forty years.

Q. During the course of this work have you studied any texts or treatises in relation to geology?

A. Practically everything I can get my hands on, and I have a very complete library of that nature, which I make use of continuously.

Q. Can you name some of the authors?

A. Professor Kemp, of Columbia University, was perhaps the first instructor that I had. I have been in the field with him for more than a month at a time. George W. Fowler, Chief Geologist of the Anaconda Mining Company. I have worked [220] in the field with him. Dr. W. S. Ward, of the Colorado Fuel & Iron Company, former Chief Geologist for them and Chief of the Geological and Mineralogical Exhibit at the St. Louis Fair. I have worked under him for several years and did a great deal of work under his direction and for him. And the Colorado Fuel & Iron Company, the Anaconda Company, the American Smelting & Refining Company, the International Smelting Com-

(Testimony of Allen C. Merritt.)

pany, which is the Anaconda, and many others—I have made many reports covering geology and geological subjects in which their expenditures were involved and in which engineering projects were involved and in which geology would necessarily be a part.

Q. And will you give us, now, the names of the authors of some of the texts you have studied?

A. Oh, practically every author on that subject, I have made use of their texts. My library is practically full of every volume, and it don't seem necessary to name the authors particularly.

Q. How many volumes on geology do you have in your library?

A. Oh, probably twenty on geological subjects.

Q. In the course of your work have you had to make studies of areas of similar formation of that involved in this place on the Owyhee?

A. Yes, sir, that is quite common.

Q. Does that structure have any particular name? [221]

A. Well, I would say an old formation, tertiary and lakebed——

Mr. Veeder: We renew our objection, your Honor. We do not think the witness is qualified. It is true that he has read books and that he has associated with geologists. He has not indicated that he is an expert in the field and that his responsibilities entailed geological investigations. He has associated and worked with other people who

(Testimony of Allen C. Merritt.)

are geologists. I submit that is not qualified.

The Court: Well, it is a question of weight. I think that, having worked in the field, he is qualified *prima facie*. The question of the weight that I will give to his testimony will depend on what I think the qualifications show.

Mr. Veeder: He has not disclosed, however, your Honor, that he has worked in the field in connection with the construction of irrigation canals. I believe that that is a peculiar field and that would make quite a difference.

The Court: They are all geologists, it would seem to me. It is one field. I realize that you can split it up into petroleum and various other fields, but, as far as I am concerned, anybody that has worked in the geological field is qualified to give an opinion. As to how much weight I will give it is a different matter. Proceed.

Q. (By Mr. Lytle): At the time you made the examination and took the photographs was the hill-side bank of the canal exposed? [222]

A. Yes, sir.

Q. Did you make a study of the different formations and of the formations in that bank?

A. Yes, sir.

Q. From your observation, would you say whether or not there had been any material change in the formation of that bank over a period of years?

Mr. Hess: We renew our objection, your Honor, that the witness is not qualified, not a geologist.

(Testimony of Allen C. Merritt.)

The Court: Overruled. I don't think that college degrees in geology amount to anything. If anybody has worked in the geological field, then I think he has a right to testify. You may answer.

A. The formation, as generally accepted by geologists, is a very old formation of lakebed and wind-blown rocks, laid down by the water, eroded by wind and laid down again. It is not necessary to name the particular age or the times it was done. The exposure there indicates that very definitely.

Q. (By Mr. Lytle): What I am trying to find out, Mr. Merritt, if there has actually been any very material change in the formations from the month of July, 1946, and the time you visited them and made your study?

A. I don't see how there could be.

Q. At the time you made the examination and at the time you took the photographs was there any evidence of a wash in the [223] field or ground below the valley side bank of the canal?

The Court: He has already said that there was.

Mr. Lytle: Yes, that is right, your Honor.

Q. Did you make an examination specifically of that wash? A. Yes, sir.

Q. What would you say as to that wash having been a very recent one or a wash of quite a number of months or years?

A. Well, the banks of the wash were somewhat eroded and tumbled down. They evidently had been more or less vertical and had caved off a little. A comparatively recent origin.

Q. I call your attention to the photograph, the

(Testimony of Allen C. Merritt.)

picture and the enlarged picture, on the upper left-hand corner of the board—the smaller one of which is Plaintiff's Exhibit No. 79, your Honor—and ask if that is one of the pictures you took?

A. Yes, sir.

Q. Where were you standing when that picture was taken?

A. It was on the upper bank of the canal, just on the rim of the hill as it——

Q. Of the hillside?

A. Yes, as it tipped over.

Q. And over what area was the picture taken?

A. Well, according to my record, the direction from that point was north 10 degrees east.

Q. Did you personally take the photograph?

A. Yes, sir.

Q. And what did you use?

A. I used a view camera the size of that plant in the corner there.

Q. Does that truly represent the view from that direction as shown in your range-finder?

A. Pardon?

Q. As shown in the range-finder, that view-finder?

A. Oh, yes, that was focused on the ground before it was exposed.

Mr. Lytle: We now offer, your Honor, Plaintiffs' Exhibit No. 79.

Mr. Hess: We object to it, your Honor, as incompetent, irrelevant and immaterial, too remote, a

(Testimony of Allen C. Merritt.)

period two years from the time of the break, not showing the true condition of the area at the time of the break, no evidence showing that conditions were the same.

The Court: No, there is evidence showing that the condition was different. I think, again, that this goes to the question of weight and not of the admissibility. I think it is entirely in my discretion and I admit it.

(The photograph referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 79.) [225]

Mr. Lytle: Then may we proceed, your Honor?

The Court: Yes. It may be marked later. Go ahead.

Mr. P. J. Gallagher: Will we take it off and have it marked?

The Court: No; I said it would be marked later. Go ahead.

Q. (By Mr. Lytle): Calling your attention to the picture on the lower left-hand corner, when was that one taken? A. The same day.

Q. And where were you standing at that time?

A. On about the same spot as in the previous picture.

Q. And in what direction was your view-finder and lens pointing?

A. That was pointing north—I will examine my notes here—that is pointing north 70 degrees east.

(Testimony of Allen C. Merritt.)

Q. Does that picture take in the valley to the east of the point on the canal you were taking into study at that time? A. Yes, sir.

Q. In the distance, in the background, is a range of hills. What hills are shown there? What are those hills?

A. They are the mountains across the Snake River Valley, on the opposite side.

Q. Now, in connection with those two pictures and the actual study you made on the ground, are you able to give anything of the geological history and geology of the area, including the area covered by the ditch bank? [226]

Mr. Hess: We object to that as the witness has not shown himself to be qualified.

The Court: Overruled.

A. Why, I think I can. I would like to explain the photographs, or the purpose of them, if——

Mr. Lytle: Will you do so? May the witness approach the exhibit, your Honor? You will find on the rail there a pointer.

A. The object of this photograph was to show the course of the canal following the contour of these gulches and around directly below the camera, and also to show the dip of the bedding of the formation on this hillside where it has been cut with this draw or gulch. It shows the bedding dipping toward the valley.

Mr. P. J. Gallagher: Pointing now to Exhibit No. 79, Mr. Merritt?

A. That is this one (indicating).

(Testimony of Allen C. Merritt.)

Mr. Lytle: The bottom one is 79. The top one is 78.

A. This is the bank of the canal, with the road on the top, and the canal is shown just below it. Here is a draw, a gully, running in a very straight line——

Mr. Hess: I wonder if Mr. Merritt can stand back just a little, so we can see it.

A. Yes. Right across here is a gully that comes up toward the hillside. It may be seen somewhere in this point here, but generally toward this basin where the canal follows back [227] into the edge of these gullies. In the middle——

Mr. P. J. Gallagher: Pardon me, just a minute, Mr. Merritt. We were in error on those exhibits, your Honor. The top one is 79.

A. This is 79?

Mr. Lytle: And the bottom one is 78.

The Court: Well, that is the way they went in. 79, the one on top, has been introduced. The other one has not.

Mr. P. J. Gallagher: That is right. 78 is the lower one.

The Court: Go ahead.

A. In the center of this photograph is a rounded hill, and there is a draw extending southeasterly, then northeasterly, to a point where this little gully intersects the side of that hill. The gully forms a very straight line. The indications are definitely that there might have been some subterranean movement at that point, weakening the formation.

(Testimony of Allen C. Merritt.)

Mr. Lytle: Now, we will offer Plaintiffs' Exhibit No. 78.

The Court: Admitted.

Mr. Hess: If your Honor please, may our objection run, the same objection that we put in to 79, to each one of them, in order that—I did not get a chance to object to that before——

The Court: All right, you can take your objection.

Mr. Hess: All right. May I renew the objection that we put in to 79, if your Honor please? [228]

The Court: Yes, the same objection is made and overruled.

(The photograph referred to, so offered and received, having previously been marked for identification on pre-trial conference, was thereupon marked received as Plaintiffs' Exhibit 78.)

Q. (By Mr. Lytle): Is the enlarged picture an enlargement of the smaller picture which is made of Exhibit 78?

A. The same as this, yes.

Mr. Lytle: We now offer the enlargements of 79 and of 78.

The Court: I am going to treat these the same.

Mr. Hess: Our objection will go to all of them, your Honor.

The Court: Yes.

Mr. Hess: We do not object by virtue of the fact that they are enlargements.

(Testimony of Allen C. Merritt.)

The Court: I understand.

Q. (By Mr. Lytle): Referring to the top picture, the second one from the left, which bears on the enlargement number 10 and is Plaintiffs' Exhibit No. 70, when was that taken?

A. May 19th.

Q. Does that picture in any way help in the development of your theory with respect to Exhibits 79 and 78?

A. May I explain the—from this point on the canal——

Q. Pointing to about the center of 79. [229]

A. ——that picture was made to show a little more in detail this dipping formation and particularly where the canal cut that formation around that point of the hill.

Q. Now, you were pointing to Number 70, toward the center background of the picture. Now, where is that with relation to the canal?

A. This picture?

Q. Yes.

A. Well, that is the canal right along there, right through the center of it.

Q. Yes. Proceed with your explanation of that picture.

A. The dip of this formation conforms to the dip of the formation that is exposed in those washes directly below the canal very closely.

Q. You are referring now to those washes in 78?

A. Yes, sir.

(Testimony of Allen C. Merritt.)

Q. Where with relation to the strata in which you show the dip in Number 70——

A. This one.

Q. ——was the area or section of the canal which you discovered where there had been a break?

A. It was somewhat south of this point. Here is the point it was taken from, that point right there (indicating). The break was back here, directly under this cleared-off area, where the material was taken down into the canal to repair [230] it. The break was right below that.

Mr. Lytle: We now offer Exhibit Number 70.

Mr. Hess: We renew our objection as made to 79, to Picture Number 79.

The Court: The objection is noted and overruled

(The photograph referred to, so offered and received, having previously been marked on pre-trial conference for identification, was thereupon marked received as Plaintiffs' Exhibit 70.)

Q. (By Mr. Lytle): I call your attention now to the picture just below that, the enlargement bearing number 7, and being Plaintiffs' Exhibit No. 73. Where was that taken from?

A. That was taken from the bank of the canal, looking across the ditch at the upper bank in the hillside. The top of the hillside shows just in the top of the picture, and this is the bottom of the canal, right at the bottom of the picture (indicating).

(Testimony of Allen C. Merritt.)

Q. I see the figure of a man standing in there, with something held in his hand. Who is the man and what is he doing?

A. Mr. Paul Bronken, who is here. He is holding a leveling rod in his hand.

Q. What was the rod intended to exemplify?

A. As near as we could tell, what the flow line or the water line of the canal was. [231]

Q. And what did it show?

A. Well, the rod is seven feet long.

Q. Now, at that point in the canal and on that bank of the canal was the formation disclosed, exposed?

A. It is shown very clearly in this photograph here.

Q. Did you find any indication of the dip which you have explained in Exhibit Number 70?

A. This dip (indicating)?

Q. No, the second one.

A. This one here (indicating)?

Q. Yes.

A. I found this stratum here substantially at right angles to the dip shown in this photograph here (indicating).

Mr. Veeder: Your Honor, isn't there going to be a great deal of confusion in the record if the witness does not refer to the exhibit and in some way designate the relationship between the two photographs?

Mr. Lytle: Yes.

The Court: Yes, of course there is.

(Testimony of Allen C. Merritt.)

Mr. P. J. Gallagher: Well, we will straighten that out.

Q. (By Mr. Lytle): Now, I understand you to say that the dip in Exhibit No. 73, the bottom one, is at right angles with the dip disclosed in Number 70? A. Yes, sir, approximately so.

Q. Yes; and what would that indicate? [232]

A. It would indicate this is the bedding of the formation at this point here (indicating).

Q. I didn't get the answer.

A. This would indicate the bedding of the formation at this point to be approximately the same as at that point (indicating). As we call it, the strike of the formation would be perpendicular to the dip, or at right angles to the dip.

Q. Now, that stratum shown in Exhibit No. 73, how does that bear with respect to the course of the canal?

A. Practically parallel to it, so far as its strike is concerned.

Q. Does it also have a dip?

A. The dip is parallel to No. 70.

Q. To the dip in No. 70? A. Yes, sir.

Q. What is the nature of that stratum in 73 which shows the break there, where you now point?

A. There (indicating)?

Q. No, all through that whole stratum? What is the nature of that?

A. That is a very soft sand formation, sandy.

Q. Any other ingredient in it?

A. Well, there is some very soft sandstone in-

(Testimony of Allen C. Merritt.)

volved in it that is pretty well broken up, as at a point indicated opposite the leveling rod, at this point (indicating). [233]

Q. Were you able to determine the thickness or depth of that stratum as shown in No. 73?

A. It would be very difficult to determine the exact thickness, because it varies at different points, but I would say the average thickness might be from two to four feet.

Mr. Lytle: We now offer in evidence Plaintiff's Exhibit No. 73.

Mr. Hess: We object to it on the same ground as we objected to the picture Exhibit No. 79.

The Court: Objection overruled and the exhibit admitted.

(The photograph referred to, so offered and received, having previously been marked for identification on pre-trial conference, was thereupon marked received as Plaintiff's Exhibit 73.)

Mr. Lytle: Your Honor, it would help the witness, I believe, in testifying if we could be permitted to put a rather large pencil exhibit number on each one of those up in the background there.

The Court: All right, I will give you a few minutes and you can do that.

Mr. Lytle: Yes.

(Short recess.)

Q. (By Mr. Lytle): Referring to Exhibit No.

(Testimony of Allen C. Merritt.)

75 for identification, what does that picture show?

A. This picture here (indicating)?

Q. Yes.

A. That shows the wash that extended down from the break in the canal, looking up the wash toward the canal. The canal is right along that line (indicating).

Q. Now, calling your attention to the horizon there and to the background in the center of that picture, did you examine the area back of that?

A. Yes, sir.

Q. What did you find as to the lands back there?

A. Well, there is very much of a depression immediately back of that horizon there, forms a sort of a basin leading down to the low point probably at about the center of the picture, at that point there (indicating)—that is, leading eastward toward it.

Q. Did you form any conclusions as to any connection between that area and the draw as shown in No. 78?

A. This draw (indicating)?

Q. Yes.

A. Yes, sir, I think there is a very definite connection. There is that same draw as shown in 78, right here, and this is the point that this wash intersected it, about the center of the picture. There seems to be a series of gullies or drainage basins leading toward the valley on this bench and in the area back of the top of the bench shown in No. 79. [235]

Q. In that wash in Exhibit 75 did you find any

(Testimony of Allen C. Merritt.)

evidences of the stratum which you have described and regarding which you have testified as shown in Exhibit 73?

A. Yes, sir, they are very closely related, apparently exactly the same materials.

Q. Did you make investigations and take levels to ascertain if the strata as shown in No. 75 and in 73 conformed to the dip you found as disclosed in No. 70?

A. Yes, sir.

Mr. Lytle: We now offer No. 75.

Mr. Hess: We renew our objection, the same as made to the picture Exhibit 79.

The Court: Objection overruled and the Exhibit 75 is admitted.

(The photograph referred to, so offered and received, having previously been marked for identification on pre-trial conference, was thereupon marked received as Plaintiffs' Exhibit 75.)

Q. (By Mr. Lytle): Calling your attention to No. 76, where is that taken with relation to No. 73?

A. The camera was set at the same point where No. 73 was taken and turned around to look along the bank of the canal and up the canal.

Q. Does that 76 disclose the dip of the stratum as you have [236] heretofore described that dip?

A. Yes, sir, it does. It is shown right through the center of the photograph.

Q. The figure of the man standing at the left background, is that the same party who was in 73?

(Testimony of Allen C. Merritt.)

A. Yes, sir.

Q. He has the rod in his hand?

A. Yes, sir.

Q. Now, what is the height of the top of that stratum at that point?

A. It is at approximately the same height as the rock above the bottom of the canal, about seven feet.

Q. That dip inclines, as shown there, or dip in the canal, that is projecting which way, north or south?

A. South.

Q. Did you take measurements and make studies to see if there was any incline or dip of that stratum to the east?

A. Well, this point is the only place exposed until you get below the bank of the canal. There it is exposed again and easily identified as the same formation.

Q. What would you say as to the relation of the top of that stratum as shown in the wash and its location, elevation, in the ditch?

A. I would say that it follows practically an even plane right up the wash and right through the ditch into the bank [237] of the canal. Our measurements would indicate that.

Mr. Lytle: We offer No. 76.

Mr. Hess: We make the same objection, your Honor, as was made to the picture Exhibit No. 79.

The Court: Objection overruled and Exhibit 76 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial confer-

(Testimony of Allen C. Merritt.)

ence been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 76.)

Q. (By Mr. Lytle): I call your attention now to Exhibit No. 69. What does that picture portray?

A. That portrays the wash at the point of the forks and runs back towards the canal. The bank of the canal is shown at the horizon.

Q. Is that the same wash that was shown in 75?

A. Yes, the point that it was taken from is right at the forks of the wash as shown in the upper center of 75.

Q. Did you, in the course of your work there, make, or under your direction have made, a drawing of that wash? A. Yes, sir.

Q. I call your attention to Exhibit No. 82 and ask you to state what that is?

A. That is a map of a stadia survey that we made to determine the boundaries of the wash. It was made by Mr. Bronken, who [238] previously testified.

Q. Now, I see pointing toward the top—the wash itself—I see pointing toward the top two sort of fingers. A. Yes, sir.

Q. Were there two channels to the wash up to that point?

A. Well, down to that point there were two channels.

Q. Well, yes, down to that point.

A. Below that there was one channel.

Q. Now, referring again to 69——

(Testimony of Allen C. Merritt.)

A. That point there was represented on the map by that point at the forks (indicating).

Q. The point in the center of 69 is the junction of the two prongs of the wash as shown in 82?

A. Yes, sir.

Mr. Lytle: We offer No. 69 in evidence, if the Court please.

Mr. Hess: We make the same objection as was made to the picture Exhibit No. 79.

The Court: The objection is overruled and Exhibit 69 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 69.) [239]

Mr. Lytle: I do not recall, your Honor, whether No. 82 was admitted. That was this tracing for——

Mr. Hess: Yes, that was admitted.

The Court: Yes, it is admitted.

Mr. Lytle: Yes.

Q. Now, I call your attention to the picture there marked No. 77. A. Yes, sir.

Q. Where was that taken?

A. That was taken at the north or downstream point opposite the break in the canal.

Q. Opposite or below, or where?

A. Just below the break, as near as I could tell where the break occurred. I couldn't tell exactly, but it was above the wash, as was indicated, somewhere in that vicinity.

(Testimony of Allen C. Merritt.)

Q. And in that No. 77 is there an evidence of the same stratum you have been discussing?

A. Yes, sir.

Q. And is that a prolongation of the stratum as shown in 73 and 75—No, no, not 73 and 75—in 73 and 76?

A. Yes, sir, I would say it is the same—evidence of the same stratum.

Mr. Lytle: We offer in evidence 77.

Mr. Hess: We object to this exhibit on the same grounds as made in our objection to the picture No. 79, if the Court [240] please.

The Court: The objection is overruled and Exhibit 77 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 77.)

Q. (By Mr. Lytle): I call your attention to Exhibit No. 74.

A. Yes, sir.

Q. Where was that taken with reference to either 77 or 73?

A. It was taken from the bank of the canal about 200 feet north of the north end of the break.

Q. And that would be the downstream side?

A. Yes, downstream from the break.

Q. Yes; and what does that show?

A. It shows the bank of the canal has been covered with a layer of earth and stabilized with a layer of gravel, a very complete job. Also, it shows

(Testimony of Allen C. Merritt.)

the crumbling of the upper bank or hillside bank along the canal.

Q. And what was that stratum along in there on the mountain side?

A. Up to this point about the center of the picture is evidently the same stratum, identical material.

Q. And approximately how high from the bottom of the ditch [241] did that stratum run at that point?

A. Well, at the center of the picture it is probably about two feet above the bottom of the canal, indicated at the left, lower left, in No. 77.

Q. And is No. 74 a prolongation to the north of the stratum shown in 77? A. Yes.

Mr. Lytle: We offer No. 74 in evidence.

Mr. Hess: We make the same objections to the introduction of this picture, exhibit, as was made to the picture Exhibit No. 79.

The Court: The objection is overruled and Exhibit 74 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 74.)

Q. (By Mr. Lytle): Calling your attention now to picture Exhibit No. 71, what does that depict?

A. It represents the canal at the point near the break with the water in it.

(Testimony of Allen C. Merritt.)

Q. When was that taken?

A. The 19th of May.

Q. And is that showing the same area disclosed in 73, 76, 74 [242] and 77?

A. Yes, sir, a portion of it.

Q. Is any of the stratum relating to which you have been testifying evident along the mountainside bank of the canal when the water is in it?

A. Just at the water line, yes, sir.

Q. So that I may understand, then do I understand you to say that the water level or water line is the top side or top line of the stratum?

A. Well, the stratum is not just exactly level.

Q. Yes.

A. It varies along that distance somewhat.

Q. And within variable, reasonably variable, distances how much does show above the water level?

A. Well, in some places about two feet or two and a half feet, and other places it is right at the water level.

Mr. Lytle: We now offer 71.

Mr. Hess: We make the same objection to receiving this exhibit as was made to the picture Exhibit No. 79.

The Court: The objection is overruled and Exhibit 71 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' [243] Exhibit 71.)

(Testimony of Allen C. Merritt.)

Q. (By Mr. Lytle): I call your attention to the picture No. 72 for the purposes of identification——

A. Yes, sir.

Q. Let's see, I wonder if you couldn't sit down. Turn your chair. What does that portray?

A. That represents the upper bank of the canal with water in it.

Q. At what point?

A. Right opposite the break.

Q. Is there any significance there evident to the eye?

A. The stratum is shown very clearly right at the water line.

Mr. Lytle: We offer No. 72 in evidence.

Mr. Hess: We make the same objection, your Honor, as was made to the introduction of Exhibit No. 79, the first exhibit.

The Court: The objection is overruled and Exhibit 72 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 72.)

Q. (By Mr. Lytle): I now call your attention to Exhibit No. 68 for identification and ask you to state what that portrays? [244]

A. That portrays the extreme westerly or upper end of the left fork or upstream fork of the wash caused by the break.

(Testimony of Allen C. Merritt.)

Q. And at that point did you find evidence of the same stratum relating to which you have been testifying?

A. It is shown very clearly right at the center of the photograph.

Mr. Lytle: We offer No. 68 in evidence.

Mr. Hess: We make the same objections as made to the introduction of the picture Exhibit No. 79.

The Court: The objection is overruled and Exhibit 68 is admitted.

(The photograph referred to, so offered and received, having previously on pre-trial conference been marked for identification, was there-upon marked received as Plaintffs' Exhibit 68.)

Q. (By Mr. Lytle): You testified that you had taken measurements and taken levels showing the course and dip of this stratum from the point where it is shown in the bank on the mountain side of the canal down to the point down in the wash as shown in No. 75. Predicated on your study and your measurements, did you make a drawing to show that and its relationship to the canal itself?

A. The drawing and the survey for that was made by Mr. Bronken under my supervision. [245]

Q. And the drawing was made under your supervision? A. Yes, sir.

Q. I call your attention to the top drawing on the board being brought to you by the Bailiff, being

(Testimony of Allen C. Merritt.)

Exhibit No. 80 for identification. Will you just tell the Court what that drawing depicts?

A. It indicates a cross-section across the canal at a point 600 feet north along the canal from Mile Post 36, and a section of the canal in which the exposure shown in the photograph is indicated in the upper bank and in the wash below the canal.

Q. Now, how far down the wash is the lower end of your picture? A. Of this picture?

Q. Yes.

A. This is a scale of ten feet to the inch, so it is approximately 150 feet down to that point there, or 160 feet.

Q. And where is that point in the wash with relation to the point disclosed in Exhibit No. 69?

A. This point here (indicating)?

Q. Yes.

A. Well, this point in the wash and the point shown about the center of 69 are the same.

Q. From your study and measurement, that stratum would run entirely through the canal and then to the east, as shown by the drawing? [246]

A. That would be my judgment. I have indicated, or had it indicated, in this band shown through there as approximately the position it would be in under the bank and come out at the same point and maintain practically an even dip, during that period, as shown in the wash below that point in 75, and also on the hillside in No. 79 and No. 70.

Mr. Lytle: We offer in evidence Exhibit No. 80.

Mr. Veeder: We object to that on the ground

(Testimony of Allen C. Merritt.)

that the witness is not qualified to prepare an exhibit of that character.

The Court: The objection is overruled. The exhibit is admitted.

(The drawing referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 80.)

Q. (By Mr. Lytle): Referring to Exhibit No. 78 and Exhibit No. 75, you testified that in your opinion there was an old stream bed through there?

A. Yes, sir, I believe that there is an old water course there.

Q. What evidence do you find supporting that position?

Mr. Hess: We object to this question, your Honor, as the witness not having shown himself to be qualified, not a qualified geologist. [247]

The Court: Overruled.

A. Calling attention to No. 73, it will be noted right at the point where the rod is being held that that stratum has broken up and discontinued. It will also be noted that there is gravel, coarse gravel, exposed in the disintegrated formation that is falling down over the bank.

Q. What does the gravel formation indicate?

A. It would indicate a water course.

Q. Now, in that connection, and in your study, did you make a drawing to show the approximate

(Testimony of Allen C. Merritt.)

location of that water course in relation to the canal and to this stratum? A. Yes, sir.

Q. I call your attention to Exhibit No. 81, which is the bottom drawing on the board before you, and ask you to state what that is?

A. That is the diagrammatic section parallel to the axis of the canal. The canal is indicated by the blue coloring, and the formation intercepted is indicated by the shading on either side up to approximately the points indicated on the section.

Q. Now, you mentioned the gravel as shown in Exhibit No. 73. Did you find any of that gravel at another point? A. Yes, sir.

Q. I call your attention again to Exhibit No. 68.

A. That is shown exposed in the upper end of the southerly fork of the wash that was caused by the break in the canal. [248]

Q. Now, can you state approximately the difference in elevation of this point in 68 where you found gravel and in 73?

Mr. Veeder: I object, your Honor. There has been nothing to show that he ever took any shots to prove the strike of the dip of this stratum.

Mr. Lytle: He testified, your Honor, that he had taken levels and measurements.

The Court: He testified that he had taken levels all the way through here? A. Yes, sir.

Mr. Veeder: He did not testify that he took levels right at that point.

The Court: All right, go ahead and tell about what you did.

(Testimony of Allen C. Merritt.)

A. These lines are ten feet apart vertically. This point in the forks of the wash is approximately thirty feet below the point the same type of formation is exposed on the left or upper bank of the canal.

The Court: How did you find that out?

A. We took measurements with a level.

Q. (By Mr. Lytle): Now, point on Exhibit No. 80 about where it was you found the gravel in connection with this formation. What is the upper one?

A. This one (indicating)?

Q. That is 80, isn't it? [249]

(The witness here indicated a point on Plaintiffs' Exhibit 80.)

Q. At that point?

A. At that point it indicated the formation that overlies this sandy, porous formation.

Q. And No. 81 was made from measurements and levels which you took on the ground or had taken under your supervision?

A. Yes, sir.

Mr. Lytle: We offer Exhibit No. 81 in evidence.

Mr. Veeder: We object to that on the ground that the witness is not qualified.

The Court: The objection overruled. Exhibit 81 admitted.

(The drawing referred to, so offered and received, having previously on pre-trial conference been marked for identification, was thereupon marked received as Plaintiffs' Exhibit 81.)

(Testimony of Allen C. Merritt.)

Q. (By Mr. Lytle): Now, I call your attention to Exhibit No. 82 and to the more or less rectangular area that is shown on there and ask you to state what that was intended to disclose?

A. That is intended to represent an area that had not produced a satisfactory crop. The ground was what we might call sour. Alkali deposits were exposed on the surface and the ordinary crops were not present. There were some weeds and other vegetation there. [250]

Q. Can you state whether the stratum you have discussed and as showing in Exhibits 73, 76, 74, 71 and 72 are pervious or impervious to water?

A. Well, there is a layer of pervious material and a layer of fairly impervious material, but in describing the impervious material it is subject to saturation by water, clearly shown in No. 71, where the water has risen into the formation since it was turned into the canal. A dark shadow is clearly shown on the bottom of the canal.

Q. I notice in 71 some things there on the bank that look like half-moons. What are those?

A. Well, that is sloughing-off of the bank.

Q. Can you state what occasions that?

A. I would say that the supporting foundation of it was this formation that has been dissolved and sloughed into the canal, as shown in No. 74.

Q. And it shows also in 73? A. Yes, sir.

Q. Now, how deep thick is that stratum that you call impervious but subject to saturation?

A. Oh, two to four feet, possibly. It is very hard

(Testimony of Allen C. Merritt.)

to define the exact thickness of it, but it is generally an irregular stratum along there.

Q. Yes; and where is the pervious material?

A. It seems to lie immediately under it. Right at this point [251] in 73 it is clearly shown, pervious material. Openings in the bank indicate that there may be percolation there.

Q. What would be the effect of water in the canal soaking back into the hillside?

A. Well, in my opinion, it would be to saturate that stratum and follow it on a slope towards the valley.

Q. Would it have any tendency to reservoir back in there? A. Oh, yes.

Q. When you were there on the 7th or 8th day of March, 1948, did you see any evidences of water along the canal bank? A. Yes, there is a——

Q. Where?

A. In this draw indicated in No. 70 there is running water.

Q. Was that live water?

A. Well, it was running water.

Q. Well, it was moving? A. Yes, sir.

Q. And where did it first appear?

A. Immediately below the canal.

Q. From your examination of the canal at that time did it present any evidence of having water flowing in it within recent months?

A. No; the canal was very dry.

Q. Did you see any other points along there where there was live or moving water? [252]

(Testimony of Allen C. Merritt.)

A. Well, in the draw shown in this picture here——

Q. In No. 78?

A. In No. 78—This picture here was taken from a point near the center of it, so we walked down in the bottom of that, and the ground was soft and moist in the bottom of that draw.

Q. Would you say that moisture came from falling rain or melting snow?

A. No, I couldn't say.

Q. What was the condition of the area around it and on the mountain side of the bank? Was that ground wet and moist at that time?

A. Very dry.

Q. Did you observe the area below the bank south of there on what has in this case been described as the Hust place? A. Yes, sir.

Q. Did you observe any water in that area?

A. I presume you have reference to this area in this point here to the south of it, you say? To the south of the break?

Q. Yes.

A. No, sir, I did not make any observations there at all.

Q. Is there some type of a structure in the right foreground of Exhibit No. 70?

A. Well, I didn't observe it. I believe there was something in there. I didn't notice what it was. There seems to be [253] quite a pit in there.

Q. You didn't check on it to notice what it was?

A. No, sir. I noticed it was a little moist down

(Testimony of Allen C. Merritt.)

in there. I walked around the edge of it and down into this field, but I didn't notice it particularly in that regard.

Q. Now, what did the fact, in March of the year, with the canal dry, that there was live or running water below the canal suggest to you or cause you to believe?

Mr. Hess: Object to that as calling for a conclusion of the witness and the witness not shown himself to be qualified.

The Court: Overruled.

A. The terrain above the canal is essentially a desert terrain; there is no moisture present. There is no moisture indicated in any of the draws above the canal along the section that I examined, but in the draw or canyon indicated in No. 70 there was running water, there was considerable vegetation and some trees and willows along the foot of the bank, occasioned, undoubtedly, by the seepage from the canal. That is natural. From such type of construction, it is bound to come. The upper or hillside bank of the canal exposing the soft rock stratum and sand composition of the material naturally will absorb a considerable amount of moisture. Over a period of several months of saturation from the canal it would entrain a considerable amount of water, forming a considerable amount of reservoir. My conclusion would be that that would be the [254] source of water running down those draws.

Q. And through what stratum would that water be moving or percolating?

(Testimony of Allen C. Merritt.)

A. Well, there is only one stratum exposed to the flow of water in the canal. It would have to be that stratum.

Q. All right, what stratum was it, then?

A. This stratum here shown in the canal, the bank of the canal.

Q. Would that be the stratum as shown in the drawing Exhibit No. 80?

A. That would be my idea of presenting it, yes, that drawing.

Q. What would be the effect of water continuously flowing through that stratum in the canal and escaping below?

A. Well, where there's strata that will absorb water, percolation will continue for a long period, like a sponge will absorb water and evaporate it, drain out in time.

Q. The water flowing and percolating through that stratum, would it or would it not have a tendency to form into channels? A. Certainly.

Q. Over a period of years would those channels become smaller or enlarged?

A. I would say that they would become enlarged.

Q. And as they did what effect would that have upon the quantity of flow?

A. The flow would naturally increase over a period of time. [255]

Q. Predicated upon your testimony, what effect would that have upon a ditch bank under which that entrained stratum would lie?

(Testimony of Allen C. Merritt.)

Mr. Hess: Object to that as incompetent, irrelevant and immaterial and calling for——

The Court: Overruled. It is opinion evidence.

A. If that continued any length of time it would establish channels of percolation and probably a considerable flow would develop; just a natural phenomenon, nothing extraordinary about it.

Mr. P. J. Gallagher: Would you read his answer, Mr. Rauch? I didn't get it.

The Court: Read it.

(Last answer read.)

Q. (By Mr. Lytle): What effect would that have upon a canal bank which is overladen?

Mr. Hess: We object to that as the witness not having shown himself to be qualified.

The Court: Objection overruled.

A. I would say that it would weaken it ultimately and possibly destroy it.

Q. (By Mr. Lytle): In the construction of a canal over such a stratum with the incline and dip you have indicated, what should be done to guard against the condition you have pictured here? [256]

Mr. Veeder: I object, your Honor. The witness has not been qualified as an engineer, not qualified as a man trained in the construction of canals—no evidence whatever on it.

The Court: Oh, I think perhaps that objection is well founded.

Mr. Lytle: Yes, your Honor, I will withdraw that question. We can approach that with another witness.

(Testimony of Allen C. Merritt.)

Q. Did you make any investigation to determine at that point where this stratum is exposed in the mountainside bank of the canal the lineal distance along the canal in which it is exposed?

A. Yes.

Q. And what was the lineal distance in the canal?

A. I would say at least 250 feet and perhaps 300 feet.

Mr. Lytle: May I inquire, your Honor, did we introduce No. 81?

The Court: Yes.

The Clerk: It has been received.

Q. (By Mr. Lytle): As the result of the study which you made personally and on the ground in connection with your associates, under the conditions which you found on the ground, do you have an opinion as to what caused the break in question?

Mr. Hess: Object to that as incompetent, irrelevant and immaterial, the witness not showing himself to be qualified.

The Court: Well, I am inclined to think that that objection [257] probably raises the point that he was not on the ground at the time the break was made, and under those circumstances, unless you give him some data upon which he may visualize the break, the objection is well founded and is sustained.

Q. (By Mr. Lytle): Have you been in attendance in the courtroom during the entire period of this taking of testimony? A. Yes, sir.

(Testimony of Allen C. Merritt.)

Q. Have you listened to the testimony of the witnesses who have preceded you?

A. Yes, sir.

Q. Did you note and observe throughout their testimony the physical conditions which existed at the time of this break in July of 1946?

A. Yes, sir.

Q. Taking into consideration those matters, together with your study made on the ground between yourself and your associates, your examination, have you an opinion as to the cause of this break?

Mr. Hess: Now, we object to that as incompetent, irrelevant and immaterial. The witness has not shown himself to be qualified and not present at the time of the break, and not a proper hypothetical question. A hypothetical question should cover each of the details and show the details as existed at the time, and this, as I say, is a pot-shot question. Whether he heard of or did not hear of is a negative pregnant, and we [258] object to that kind of hypothetical question.

The Court: Wigmore states the rule that a hypothetical question can be based upon the testimony of a particular witness or series of witnesses, so long as the field is limited so that the trier of the facts can determine upon what basis the answer to the hypothesis rests. However, in this instance, exercising my discretion, I rule that a question should be asked in the strict form, in order that I should find what elements counsel has taken into consideration in determining the witness' opinion.

(Testimony of Allen C. Merritt.)

Mr. Lytle: Well, your Honor, with that question we would conclude the examination of this witness. I am wondering if we might not prepare our hypothetical question and place it before the witness the first thing in the morning.

The Court: Yes, you may prepare it, prepare it in writing, and submit a copy to counsel.

Mr. Lytle: Yes, sir.

The Court: Court will be in adjournment until tomorrow morning at ten o'clock.

(Whereupon, at the hour of 5:00 o'clock p.m., Thursday, June 10, 1948, the trial of the above-entitled cause was suspended, the Court taking an adjournment until 10:00 o'clock a.m., Friday, June 11, 1948.) [259]

Friday, June 11, 1948, 10:00 A.M.

ALLEN C. MERRITT

thereupon resumed the witness stand as a witness in behalf of the plaintiffs herein and was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. Lytle:

Q. Since your examination yesterday, Mr. Merritt, I have been checking your testimony with respect to general qualifications. Have you had any experience in hydraulic engineering other than the period of your general statement yesterday?

(Testimony of Allen C. Merritt.)

A. Yes, sir.

Q. State that experience.

A. I have constructed a number of canals and ditches.

Q. Any canals or ditches comparable to the canal under consideration?

A. I never have supervised the construction of anything as large or long. Cross-sections comparable have been constructed, but not such length.

Q. Yes. Well, the area of the canal under consideration is short, the cross-section.

A. Very closely, yes, sir. In fact, several short canals of that capacity. [260]

Q. Are you acquainted with Mr. Spofford?

A. Yes, sir.

Q. The present Superintendent and engineer in charge of this project?

A. Yes, sir.

Q. When did you know him? When did you first know him?

A. Possibly about 1933.

Q. To your knowledge, did he ever occupy any official position in the State of Idaho?

A. Yes, sir.

Q. What was that position?

A. Commissioner of Reclamation.

Q. Did you ever perform any hydraulic engineering under him while he was in that office?

A. I believe I made some investigations and reports to his department. I can't recall just exactly the dates or what they were.

Q. Yes.

(Testimony of Allen C. Merritt.)

A. I am satisfied I was doing some of that nature of work and had some contact with his office.

Q. In the course of your work in hydraulic engineering, how many miles of canals of different sizes, length and cross-sections have you supervised?

A. That would be very hard for me to say, but of fairly large canals perhaps forty or fifty miles altogether, of fair-sized [261] canals; and of ditches, probably many irrigation ditches, farm ditches and other small ditches, that may run into maybe 1500 miles or more.

Q. And in the course of that work have you constructed ditches and canals along the side or break of the hill on terrain similar to the one under discussion here?

A. Yes, sir.

Q. And in that work was it constantly necessary for you to guard against leakage and seepage?

A. Oh, yes, every precaution to loss of water.

Q. Yes. In that work have you contacted the impervious and insoluble strata and the pervious strata you have testified regarding here?

A. Yes, I have had quite a little experience in that kind of conditions.

Q. Is this type of stratum that you have found in your investigation in this canal unique?

A. Oh, I think it is very common that most of the reclamation projects that have been constructed where the canals are diverted from the streams and carried along the sides of the valley encounter comparable formations, soft surface formations.

(Testimony of Allen C. Merritt.)

The Court: It would be helpful to me if I knew where he has done all this work.

Mr. Lytle: Very well, your Honor.

The Court: Because it makes considerable difference [262] whether it is in an area comparable to this or not.

Q. (By Mr. Lytle): Now, where has this work in the hydraulic engineering been performed?

A. In Beaverhead County, Montana, on the Blacktail Deer Creek drainage, I designed and supervised the construction of a canal for the Poin-dexter-Orr Livestock Company that was in a very similar formation to this.

Q. Was that in an area comparable to this from the standpoint of general climatic conditions?

A. I think it was a little colder climate, at a considerably higher elevation; about 5,000—5,600 feet, I believe.

Q. Do I understand you to say that the formations were quite similar to the formations here?

A. Yes, sir.

Q. And where else have you——

A. In the Lemhi Valley, small canal with a carrying capacity of about 200 second-feet, 100 to 200 second-feet, along a similar formation, very similar to this.

Q. Where is the Lemhi?

A. It is in Lemhi County, in Idaho, in the Eastern part of the state.

Q. Was that an area of similar character to the area in which you made this investigation?

(Testimony of Allen C. Merritt.)

A. Quite similar. The country has a greater slope, but the bedding of the formation is very similar. [263]

Q. And is that also in the desert-type country?

A. How is that?

Q. Is that also in the desert-type country?

A. Oh, yes, the canal is for irrigation of desert lands.

Q. I believe that you did not give us the capacity of the canal you constructed in Montana.

A. It was around 100 second-feet average; at the head somewhat more, perhaps 150 feet; carried 100 second-feet a considerable length, perhaps sixteen miles.

Q. Now, have you since that time been in general construction, supervising hydraulic engineering, in Western and Southern Idaho?

A. Yes, sir.

Q. How many years general practice there?

A. Well, I can't recall when I first begun doing any work—I did some work on the Owsley Project—Mud Lake Project it is commonly known—in Eastern Idaho. I believe in about 1908 I was in there first, and again in 1912, and I made some later investigations. I can't recall the exact time without looking up my records, but it is somewhere in there.

Q. Yes. In your work around Boise and in Western Idaho do you find the conditions of climate and soil and strata generally the same as you have found in the area under study?

(Testimony of Allen C. Merritt.)

A. There are certain slight variations between localities and throughout the route of the canal, normally they will vary, [264] but the conditions were fairly similar in this type of work.

Mr. Lytle: We are now ready, your Honor, to propound a hypothetical question to this witness. A copy has been supplied to counsel for the Government.

The Court: Have you read this question?

Mr. Hess: Well, if your Honor please, I think it should be submitted, handed to the party himself, in the record.

The Court: Well, that is true, but if you see any objections you might as well tell me.

Mr. Hess: Yes, I have objections.

The Court: All right, what do you object to?

Mr. Hess: We object to this hypothetical question for the reason that the witness has not shown himself to be qualified. We object to it on the ground that it is not a proper hypothetical question. It does not cover the evidence as in the record, shown in the record. In particular, it overlooks entirely the consideration of the lateral ditch described in this situation completely or practically surrounding the wet area below the break of the canal. It assumes a state of facts that are not in the evidence, wherein it states, in particular, that where the break occurred there was no core wall constructed in the lower bank of the canal. There is no evidence here as to the manner of construction of the wall, whether it was a cut completely which covered not only the

(Testimony of Allen C. Merritt.)

upper but the lower bank of the canal, which is merely speculation and guesswork [265] on the part of the evidence that has so far been introduced here in this case. There is no evidence of how the wall of the canal was constructed. And the hypothetical question does not include at all or mention in any degree the evidence that was put in here about the silting of the bottom of the canal or the depth of it prior to the time of the break, or of the wall of the canal that went out, and there is no evidence of any relationship, as shown in the evidence, whatsoever between this seepage area that is described in this hypothetical question of 200 or 250 yards south and east of the spot described later as the break in the canal. As to the break that actually happened in the canal, there is no casual connection shown whatsoever of it, and it does not include the evidence as to the condition of the subsoil or other strata underneath the floor of the canal. And, generally, the question does not cover the evidence that is introduced, as, under the evidence introduced, the evidence so many times has shown that there was no knowledge of what had happened when the canal was constructed here. We think that this whole question would be the merest and wildest guess and speculation as to what caused this, by virtue of the evidence that has already been introduced.

The Court: Go ahead and read the question.

Q. (By Mr. Lytle): Mr. Merritt, assuming that the North Canal of the Owyhee Project was built in 1934 in the manner and [266] through the types of

(Testimony of Allen C. Merritt.)

soil that you have observed and found on your examination of that canal in 1948, and regarding which you have testified in this hearing; and assuming that in the year 1945 wet spots developed in the soil in the area immediately adjacent to the lower bank of the said canal to such an extent that it was difficult to cultivate and plow such spots because of the water in the soil, and that when the crops on said area were cut the water would rise in the mower and horse tracks, and that tractors could not be used in said harvesting operation because of the wet condition of the soil; and assuming that this condition existed over an area of approximately one and one-half acres in different spots adjacent to said canal; and assuming that a water seepage developed in an area of some 200 to 250 yards south and east of the spot later to be described as a break in the canal and that such seep has increased materially to a point where it now runs in a perceptible stream or flow; and assuming that on July 14, 1946, the North Canal was carrying approximately 450 second-feet of water, and that on that date a large segment of the lower bank of said canal broke away and was washed away below the normal bottom of said canal; and further assuming that in the construction of that part of the canal where the break occurred no core wall was constructed in the lower bank of that canal; assuming all the matter suggested to you in this question, and taking into consideration the type of soil you found in the [267] sides and bottom of the canal upon your examination in 1948

(Testimony of Allen C. Merritt.)

and regarding which you have testified, have you formed an opinion as to what caused the ditch to break in July of 1946? A. Yes, sir.

Mr. Hess: If your Honor please, there are two additional objections I would like to add to what I have just stated. I further make the objection that it does not include the evidence that has been introduced in the case to the effect that there were two breaks in the canal, one on July 14th and one on July 19th, in 1946, no mention being made of the time of the breaks in this canal; and further to the effect that this canal had carried water since its construction for some eleven years and had no breaks in the vicinity of where this break occurred, or in that vicinity.

The Court: I shall rule on the objection as a whole as if it were made after the asking of the question, and this ruling will control, and you may have an exception to the whole field in this regard. It is not a proper objection to the hypothetical question that it does not cover the whole field of the evidence. The propounder of the question may choose what phases of the evidence he thinks are of value for his theory or purpose. The trier of the facts must take into consideration the elements of fact which are asked about by the propounder in making up his mind as to what weight is given to the question. It is not a proper objection to a [268] hypothetical question that it assumes facts not in evidence. I think that there is no valid objection here as to the substantive facts not in evidence. The

(Testimony of Allen C. Merritt.)

question here does, it is true, leave out certain phases of the evidence which counsel for the defense apparently thinks are important, but the method of procuring that is to ask hypothetical questions based upon that assumption by the defense. On the whole, this question now fairly delineates the evidence which the Court will have in mind in construing the question and the answer and, therefore, the Court thinks it is proper and may be answered.

Q. (By Mr. Lytle): What, in your opinion, was the cause of the break in this canal on the 14th day of July, 1946, being the first break?

A. May I extend the——

The Court: No, just tell what you think was the cause of the break, if you have an opinion.

A. My opinion was formed, after investigating the conditions, that the canal was dug through a pervious stratum and that stratum continued to absorb water over a period of years until it became saturated and somewhat in a liquid state and in that condition would not support the bank that was built on the slope of the hillside where the canal cut through.

Mr. Hess: I wonder if the Reporter could read that answer?

The Court: Yes. [269]

Mr. Hess: So we could get it down.

The Court: All right.

(Last answer read.)

Q. (By Mr. Lytle): Predicated on the same elements contained in my hypothetical question to

(Testimony of Allen C. Merritt.)

you, have you an opinion as to what caused the second break of the canal?

Mr. Hess: If your Honor please, may I renew my objections to this, the same as to the previous hypothetical question?

The Court: The ruling is the same.

A. My opinion would be the same.

Q. (By Mr. Lytle): Having expressed your opinion on the cause of the two breaks in the canal, and taking into consideration all the factual situation contained in the hypothetical question propounded to you, and also taking into consideration the conditions you found in your examination of March 7th or 8th, April 1st, the latter part of March, and again in May, of 1948, and relating to which you have heretofore testified, have you formed an opinion as to how the break which occurred in July of 1946 could have been avoided at the time of the original construction or later?

Mr. Hess: May we renew our objection as given to the original hypothetical question and include our reasons for this?

The Court: The objection as renewed and restated is overruled. [270]

A. In my experience, in the construction of a canal of that magnitude the cross-section at a point where there's questionable foundations, the section should be made considerably larger and lined with an impervious lining. Concrete sometimes is used. It is very expensive. Earth of proper character, of sufficient thickness and stabilized with enough gravel

(Testimony of Allen C. Merritt.)

to prevent its flowing, makes a very satisfactory lining and has been used by me in a great many cases where similar conditions existed with success.

Q. (By Mr. Lytle): And, in your opinion, would that type of lining have avoided the seepage and leakage found in this section?

A. That would be the purpose of it, but careful examination of the portion of the canal would indicate if further measures were necessary to prevent seepage.

Q. Did you examine the lining of the canal after the repair, and on the lower side of the canal?

A. Yes, sir.

Q. Had the entire canal been lined with material of that character over the section involved, would it, in your opinion, have been effective in preventing leakage and seepage?

Mr. Hess: We renew our same objection, your Honor, that the witness is not qualified, and the other elements as set forth in our objection to the first hypothetical question.

The Court: The objection as renewed is overruled. [271]

A. May I make reference to the photographs, please? In Exhibit No. 74 there is a very splendid job of lining on the lower bank. It shows very clearly——

Q. (By Mr. Lytle): Will you stand back to the wall a little closer, so the Court may see.

A. The object of this photograph was to show that lining. It has been very well constructed and

(Testimony of Allen C. Merritt.)

has no apparent sign of any weakness. There is no lining on the opposite side of the canal where the stratum is exposed. I believe that both sides of the canal should have been lined and that the nature of the lining material should have been determined before it was placed in the canal, tested and determined as to its efficacy.

Q. I don't know as my question is specifically answered now. If the entire canal had been lined as the outer or the valley bank of the canal is now lined, would that have been effective in preventing excessive seepage or leakage?

Mr. Hess: We object to that. We renew our objection as in the first hypothetical question; further, that it is incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

A. That would be my opinion, yes, sir.

Q. (By Mr. Lytle): You mentioned that in a section such as this under consideration it should have been widened. Just what do you mean by that? [272]

A. To provide for lining and maintaining a uniform cross-section so that the velocity of the water in the canal would remain constant.

Q. Would a lining on the slope which you found on the hillside bank of the canal be effective—that type of lining?

A. It certainly would, if it is effective on the lower side where it is exposed entirely to the water.

Q. I think you overlooked one aspect of my question. Is the bank of the hillside side of the

(Testimony of Allen C. Merritt.)

canal in the same slope as the bank on the valley side?

A. No, it is not. The photographs will indicate that.

Q. Yes. Now, what is the difference? Just state it in plain words.

A. Well, they are nearly vertical, the slopes on the hillside.

Q. Then, as I understand you, for the type of lining used on the valley side of the canal it would have been necessary to give the mountain side of the canal a greater slope? A. Yes, sir.

Q. Now, that almost perpendicular wall on the mountain side of the canal, what effect does that have so far as sloughing of the mountain side into the canal? A. It becomes wet——

Mr. Hess: We renew our objection, your Honor, the same as to the first hypothetical question asked.

The Court: The objection is overruled. [273]

A. It becomes saturated with water and slides down into the canal.

Mr. Lytle: That concludes our direct examination, your Honor.

The Court: I expect to conclude this session at about twenty minutes to twelve, so that might give you some idea how you want to start your cross-examination.

Mr. Hess: Do I understand of the Court that if we did not start cross-examining the witness now—As I understand, they are not completed with their evidence—that the Court would permit us to cross-

(Testimony of Allen C. Merritt.)

examine at the next adjournment of the Court, or should we wait——

The Court: I think he has covered a lot of testimony. If you do not want to take up the hypothetical phases, I will postpone those until the end of the cross-examination—That would be next Monday—but I think he has covered enough ground that you can cross-examine now until adjournment.

Mr. Hess: I see. Go ahead.

Cross-Examination

By Mr. Veeder:

Q. Mr. Merritt, you did not state what was the general descriptive name of this area.

A. What——

Q. What is the geological reference to this area to which you have been testifying? [274]

A. It is generally recognized as a lakebed formation.

Q. What is the name of that?

A. Oh, I wouldn't place any particular name on it. It has no bearing on the——

Q. Isn't there a common reference to this area?

A. Oh, yes, there is the Miocene lakebeds, or late Tertiary formations it is generally called.

Q. Isn't there a general reference to it as the Idaho formation? A. Oh, yes.

Q. Well, will you state what the Idaho formation is?

A. Oh, I will merely state that what we see here is a part of it.

(Testimony of Allen C. Merritt.)

Q. In other words, this is part of an old lake-bed, is that correct? A. I would say so.

Q. Would you state how deep it is through this area? A. Oh, I wouldn't be able to say.

Q. In your testimony yesterday you stated that this was the bed of an old stream, as I understood.

A. I believe you misunderstood my——

Q. Well, didn't you state that the way the gravel got in there was by reason of the fact that it was a stream?

A. Oh, I mentioned a small area in the bottom of the canal indicated a water course. [275]

Q. Well, isn't that a stream?

A. Not unless there is water running in it, I wouldn't call it a stream.

Q. Well, you stated that it was an old water course that deposited gravel in the stratum concerning which you testified. A. Yes.

Q. Now, would you state how that could be a stream and at the same time the bed of an old lake?

A. Just through a gully washed in that bed.

Q. Well, at what time?

A. Well, I wasn't there. I couldn't testify as to that.

Q. Well, I think the record is extremely confusing when you say the deposit is there by reason of a stream and at the same time you say that it was an old lakebed.

A. In any formation of this type there has been erosion taking place over a long period of years.

Q. Well, did the—Excuse me; go ahead.

(Testimony of Allen C. Merritt.)

A. As the erosion takes place lateral channels are washed toward it due to the storms, surface water falling, it would cause the deposition of gravel where there has been considerable flow.

Q. Well, if there was considerable flow over this so-called porous area, wouldn't that have washed out the porous area?

A. Oh, not necessarily. [276]

Q. Well, now, you stated earlier that water from the canal, if permitted to seep in there, would wash it out?

A. That is right.

Q. Then why wasn't it washed out by this stream?

A. Well, the stream dried up.

Q. Well, if it was depositing gravel into that substratum there it would seem to me that it would certainly have the effect of washing away the porous area, would it not?

A. Well, it has to a certain extent, yes.

Q. Well, I still think that you have not clarified in any way the reference to a stream and the ancient bed of the lake. If you would step up there and show us how that can be, that a stream deposited that and at the same time the lakebed deposited.

A. I think it is very clear that there is gravel in the bank at that point.

Q. Now, is that beneath the stratum of porous?

A. To a certain extent, it can be seen that the stratum is broken up in that area.

Q. Is it not all the way through the stratum?

A. Well, I haven't been able to tell you. I didn't examine it——

(Testimony of Allen C. Merritt.)

Q. You didn't examine it?

A. I examined it in this point and in this point below.

Mr. Lytle: Referring to Exhibit No. 68. [277]

Q. (By Mr. Veeder): Now, was that stratum deposited there by a stream or by a lake?

A. I would say it was a fault that took place as the surface of the lake receded.

Q. Then it was not the stream?

A. Well, I believe water flowed in the channel, if that is what you mean.

Q. I didn't hear.

A. I believe some water must have flowed down that channel laterally to the valley.

Q. Well, if there was a stream flowing through there would it not wash away the porous area?

A. Why, it did to a certain extent. That is very evident.

Q. Now, in general, throughout this area, are there not other strata of the same character?

A. Why, undoubtedly they occur——

Q. In this same area it is not possible that there was another stratum of porous beneath this stratum to which you refer?

A. I have no doubt that there would be.

Q. Isn't it true that the width of this stratum varies as it progresses through the earth?

A. Oh, certainly.

Q. Then can you say with a certainty that there is an unbroken line of porous material between the wash and the bottom of the canal? [278]

(Testimony of Allen C. Merritt.)

A. Only by the exposures.

Q. Did you make any drillings to ascertain that fact?

A. Between these two points where it is exposed, you mean?

Q. Between the wash and the upper bank of the canal?

A. No, sir.

Q. You made no drillings at all?

A. No, sir.

Q. Now, you made a statement earlier that the stratum might break and there might be intervening portions of different material, isn't that correct?

A. Oh, yes, that would occur in any stratum.

Q. In other words, there is no assurance that the porous stratum proceeds from the wash to the upper bank of the canal?

A. Only from the indications in the vicinity.

Q. Now, would you tell us how you arrived at the conclusion that that stratum proceeds up through that area?

A. I refer again to Exhibits 79 and 70, where the dip of the stratum is indicated on the mountain side.

Q. Now, what is the degree of inclination of that dip?

A. We measured it in several places and it averaged about nine degrees.

Q. It averaged about nine degrees?

A. Yes, sir.

Q. What were the extremes in reaching that average?

(Testimony of Allen C. Merritt.)

A. Well, there was very little variation. When we measured [279] the level between this point on Exhibit 80 where it was exposed and where it was exposed again in the wash below, our measurements indicated we were only 42 minutes off of the angle determined at these other points.

Q. And on this Exhibit 81,—Now, that is the lower one there—what does that disclose? Does that disclose the continuity of the dip there, is that right?

A. This section is parallel to the axis of the canal. It is diagrammatic, with the exception of the elevation of the bed that we are discussing. It shows that at two points, in Exhibit 74, between the two points indicated on the bank opposite where the break occurred.

Q. In other words, that demonstrates the continuity of the porous area, is that correct?

A. Yes, sir. It also indicates that there is a slight variation between the elevation at that point and at that point (indicating).

Q. Well, what is the extent of that variation? If those lines were to be continued on this bank here, would you show the degree of that?

A. On this bank (indicating)?

Q. Yes.

A. It will come in above this slightly (indicating).

Q. That is true, then, the fault of the porous area on your diagram, is that correct? [280]

(Testimony of Allen C. Merritt.)

A. It indicates that there has been a movement at that point.

Q. In other words, there has been a separation?

A. A slight separation, yes, sir.

Q. And that has continued throughout the whole area?

A. I don't understand that exactly.

Q. The movement was a general movement, if I understand your statement?

A. Oh, no, not necessarily. It may be likely. That point there indicates a movement, which is indicated also in Exhibit 68, which bears the same angle of slope directly opposite where it is exposed or below where it is exposed in the canal.

Q. But you did state that there was a showing of subterranean movement, isn't that correct?

A. Yes, sir, that shows in Exhibit 68 very clearly.

Q. In other words, it is not possible to assert that there was a continuous porous area as disclosed on your Exhibit 70 and on your Exhibit 73? That there is a very apparent departure from a continuous dip?

A. Do I understand you to refer to the dip indicated here (indicating)?

Q. Yes.

A. And indicated here (indicating)?

Q. Yes.

A. Well, they are fairly continuous, yes, sir.

Q. But they are broken? [281]

A. Slightly, yes. In most geological conditions you will find that.

(Testimony of Allen C. Merritt.)

Q. Would you take this ruler and continue that on right there in the part of the canal and just show the amount of departure there. Now, in a very short area isn't there a departure just about an inch on that exhibit?

A. About a half-inch, yes, sir.

Q. Well, now, for such a small area isn't it true that for the great number of feet this must continue to have a continuous porous area? Isn't it true that you cannot say with any certainty at all that that porous area which you show there on your 81 is continuous? Doesn't this lateral just prove that your picture is not demonstrative of what actually exists?

A. I think you misunderstood me. It is indicated in Exhibit 68 that there is displacement there, slight displacement, along that plane.

Q. The point that I am making is that you have submitted that Exhibit 81 to the Court as part of the record as disclosing a continuous porous area, but your Exhibit 81 shows that it is not a continuous area and that in the very short area that you have there there is a variation of a half-inch?

A. That is right, in that distance, yes, sir.

Q. Now, would you state whether your investigation discloses that the porous area enters the bottom of the canal? [282]

A. I would think so, yes, sir.

Q. It does now? A. I am sure it does.

Q. But at the same time you have demonstrated a lining on 74, isn't that correct?

(Testimony of Allen C. Merritt.)

A. This here (indicating)?

Q. Yes. A. Yes, sir.

Q. And isn't that between the water and the porous area?

A. The porous area is below the bottom of the canal.

Q. That is correct? A. Yes, sir.

Mr. Veeder: I submit, your Honor, that these Exhibits 80 and 81 should be stricken from the record because they do not disclose, by the witness' own testimony, the true picture of this porous area upon which they rely as the basis for the break in the canal.

The Court: That is an argument. Motion denied.

Q. (By Mr. Veeder): In your testimony concerning construction, would you state the factors which you take into consideration in determining the course and location of a canal?

A. In the first place, the object is to conduct water from one point to another.

Q. I think that is obvious.

The Court: The remark of counsel is stricken. You asked [283] him a question and he made an answer which is very proper. Go ahead.

Q. (By Mr. Veeder): How many acres of land are there in the area served by the North Canal?

Mr. Lytle: We object to that as being improper cross-examination.

A. I have no knowledge of the area.

Mr. Lytle: Just a moment.

The Court: He says he has no knowledge.

(Testimony of Allen C. Merritt.)

Mr. Veeder: He has no knowledge. Well, where would you have located the canal other than its present situs?

A. I don't believe that there is any choice in the location of the canal.

Q. Well, you objected to the area over which this canal was constructed.

Mr. Lytle: I object to that question on the ground that it is contrary to the statement of the witness.

Mr. Veeder: He said the foundation of the canal—Excuse me.

The Court: Just a moment. The objection is sustained.

Q. (By Mr. Veeder): Would you state whether this condition which prevailed here, this porous condition, is general throughout the whole area?

Mr. Lytle: We object to that as not being proper cross-examination. The testimony of this witness as to the porosity [284] of the stratum was confined solely to the area under investigation.

The Court: Overruled. Proper cross-examination.

A. I did not examine much of the area, outside of the general appearance of it. I would say that it was in an area that was subject to considerable seepage and that the condition was somewhat general along the route of the canal.

Q. (By Mr. Veeder): Are you acquainted with other canals in the area? A. Oh, just generally.

(Testimony of Allen C. Merritt.)

Q. What is the general practice concerning their construction?

A. I think it follows the general practice on this canal.

Q. In other words, this is the general practice of constructing canals in the area?

A. Yes, sir, I think so.

Q. You think it is reasonable, under the circumstances, to get water to the land in the way that this canal is constructed? A. I would say so.

Q. You made no borings whatever in the canal bank to ascertain the continuity of the porous stratum?

A. No, sir. The stratum is exposed there and openings are plainly visible. You can reach your arm in there two or three feet in those places.

Q. Did you check to see if there were any other stratum of porous area which might have proceeded beneath the canal? [285]

A. Well, there was none exposed where I examined it.

Q. There were none exposed?

A. I didn't see any.

Q. Well, could the degree of variation of the porous area have been such as to run the porous area, project the porous area, beneath the canal? Suppose there was a variance of two or three degrees there?

A. I don't quite get the question. Do you have reference to this Exhibit 80?

(Testimony of Allen C. Merritt.)

Q. Yes, that is correct. What would the variance of two degrees do to the strike or the dip of that porous area?

A. Well, if it was flatter it would bring it out higher up on the hillside.

Q. That is correct; and if it were——

A. If it were steeper it would bring it out lower down.

Q. And it might pass entirely beneath the bottom of the canal without entering it?

A. If there were such a condition. I did not observe anything of that kind.

Q. In other words, a couple of degrees would have done that?

A. Why, yes, a change in the angle would have done that, certainly.

Q. That is correct. You stated that the upper bank of the canal was in effect a reservoir. Would you explain that?

A. I don't recall having made just exactly that statement. [286]

Q. That specific statement is in the record.

The Court: Now, just a moment. Don't argue with the witness.

Mr. Veeder: I am sorry, your Honor. I am sorry.

The Court: Ask him questions, that is all. He says he doesn't remember it, and that is a ground for argument afterwards if you find such a statement in the record.

(Testimony of Allen C. Merritt.)

Q. (By Mr. Veeder): Well, did you or did you not say that the upper bank of the canal was in effect a reservoir?

A. If I said so I certainly did not intend to make the statement just exactly that way.

Q. Well, what did you intend to say?

A. My intention was to indicate that the material was porous and would absorb a certain percentage of moisture which would remain, perhaps, over a period of time and gradually drain out.

Q. Would you explain on your diagram 80 how that would occur?

A. The water line is above this porous stratum.

Q. Yes.

A. The indications after the water was turned into the canal are that by capillary attraction, indicated in Exhibit 71, the moisture was creeping up in the formation. It shows a darkening line on there very distinctly, but——

Q. But does it enter the porous area and proceed upward? Is that what you say? [287]

A. I would say so, yes, sir, that would happen.

Q. It runs uphill, in effect?

A. No, sir; it is capillary attraction.

Q. But it does proceed against the grade?

A. Yes, sir.

Q. About how far would you say it would go?

A. I wouldn't tell without examination. It would take time, and the saturated formation——

Q. Have you any idea how much water would be accumulated in there?

(Testimony of Allen C. Merritt.)

A. Oh, I wouldn't be able without making careful tests of the amount possible in the formation.

Q. Well, what is the purpose of the statement that, as I understood it, water would be accumulated in that area?

Mr. Lytle: We object to the form of the question.

The Court: Overruled.

A. The presence of water in the gulch somewhat to the north, shown in this picture here and in this picture, Number 79 and Number 70, would have to be determined, as there was no water above the canal at any point, but there was water running down there, and was at the time I went to the location.

Q. At what time?

A. Oh, in March, and again in the first of April. There was no water in the canal at that time and still there was water running down that canyon and other evidences of moisture. [288]

Q. There was no water in the canal at all?

A. No, sir. Here is the canal on that date.

Q. There was in March, was there not?

A. That was the first of April when I took the pictures.

Q. Well, in the spring of the year isn't it pretty general that there is snow and water and rain?

Mr. P. J. Gallagher: Not in this country, Brother.

Mr. Veeder: Well, Mr. Gallagher,——

(Testimony of Allen C. Merritt.)

The Court: Counsel, we will get along without you testifying.

A. Certainly it rains in the spring, yes, sir.

Q. (By Mr. Veeder): It could come from those sources; is that not possible?

A. Well, there wasn't any indication that there was any water above the canal at all.

Q. Did you go back in the foothills?

A. Oh, yes; yes, sir.

Q. How far did you go?

A. Oh, seven or eight hundred feet, perhaps an eighth of a mile.

Q. Isn't it entirely possible that, due to the slant or inclination of the land toward the river, water from other sources to which you refer should be on the surface of the land down in the field?

A. Oh, yes, it is possible. [289]

Q. In other words, isn't it wholly possible that the rain and the snow and the natural percolation of the water in the land would flow toward the river; is that not correct? A. Certainly.

Q. Then you have no certainty that the canal was the source of the water?

A. I reason it this way, that the vegetation shown and the growth shown in that gully there is very young, it hasn't been there but a very few years.

Q. What is the type of vegetation?

A. Oh, it is small willows and small cottonwood trees.

(Testimony of Allen C. Merritt.)

Q. What is the type of vegetation further down towards the river?

A. Down here (indicating)?

Q. Yes.

A. Oh, wherever there is water there is vegetation.

Q. It could be, in other words, that water from any source would do that?

A. Oh, yes, sir.

Q. Then there is no assurance that it is from the canal?

A. I would say that that is possible.

Q. If this water was absorbed into the upper bank it would be necessary for it, on the basis of this diagram of yours,—Wouldn't it be necessary that it proceed back through the canal? [290]

A. In what manner do you refer? I don't get your question.

Q. Well, you have indicated absorption on the upper bank, isn't that correct?

A. Yes, sir.

Q. And you have indicated with that water which is absorbed even along in March and April, even though the canal was shut off in October, the water arises down in the field some several hundred feet down the hillside, isn't that correct?

A. Yes, sir.

Q. Now, if the water proceeds down—and you have testified that the water proceeds down that porous area, isn't that correct?

A. Yes, I would think so, yes, sir.

(Testimony of Allen C. Merritt.)

Q. Then if that water were to proceed down along the dip which you have of that porous area it would necessarily pass into the canal, would it not? It would have to?

A. No, I understand that the water that we mentioned as probably being absorbed by this formation would have to pass into the canal?

Q. It would have to reach the porous stratum to proceed on down?

A. Why, there isn't any indication that this stratum was cut by the canal the whole length of it; only at this point (indicating).

Q. We are talking about the place of the break now. [291]

A. Yes. Well, that point, there was a very little bit of that area exposed, and consequently only that area would be involved in the question, as I understand.

Q. But you have pointed out that the canal is lined on the outer bank, so the water would necessarily have to pass through that lining, is that not correct?

A. Oh, no, I don't think I testified to that. I testified that it was my opinion that the water would follow under the canal down this porous stratum.

Q. It would leave the porous stratum and then return to it, is that what you mean?

A. I mean that where the canal crossed the porous stratum it was exposed on the side and in the bottom of the canal.

(Testimony of Allen C. Merritt.)

Q. But we are talking about the return of the water, the absorption in the upper bank. I am interested in how at this time, this spring, it came from the upper bank down to the place to which you refer, the seep area?

A. By the simple process of draining out of the porous stratum.

Q. Well, how did it get into the lower part of the porous stratum, as disclosed by your chart? Would it not necessarily proceed through the lining of the canal, the lower side lining?

A. Why, if there was a direct flow into the bank of the canal it would probably flow into the lining of the canal.

Q. I am talking about when the canal is dry. I want to know [292] how the water comes from the stratum in the upper bank to the stratum in the lower bank so that it would proceed down, as you say, and appear out in the field?

A. During the time that the water is in the canal this stratum is exposed to that moisture and it would have absorbed a considerable amount of it.

Q. Goes through the lining of the canal?

A. Why, not necessarily the lining of the canal. It is exposed in the bottom of the canal.

Q. Still you are not responding to my inquiry. My inquiry is, when the canal is empty how the water proceeds from the so-called absorption area on the hillside of the canal down through the porous stratum, as you have disclosed on your—You de-

(Testimony of Allen C. Merritt.)

pict there—how it gets down into there from the upper side?

A. As I explained, the stratum would become saturated.

Q. When the canal is dry it is saturated?

A. Well, after the water is turned out it still retains the water that is in the stratum.

Q. Well, doesn't the canal intersect the porous area, according to your chart? A. Yes, sir.

Q. Then is there not a break in the porous area?

A. In the canal? You mean that there is a break in the porous area in the canal? [293]

Q. Yes, as depicted by your picture?

A. I projected the slope through the canal, showing that the canal had cut through the porous area, which it did.

Q. That is right.

A. In the exhibit—

Mr. Lytle: Eighty-one.

A. —81 we have indicated, diagrammatically only that there probably was a water course below it, that the water in the canal could saturate that same area and flow out for some considerable time after the water is turned out of the canal.

Q. (By Mr. Veeder): But that still does not answer the question of how the water from the upper part gets into the porous area of the lower part and proceeds down through that porous area?

A. This porous stratum is exposed along the bank of the canal for a considerable distance. It could follow it without necessarily following under the bank at that particular point. It could follow,

(Testimony of Allen C. Merritt.)

it could be absorbed along the bank of the canal for a considerable distance above and below the break and still hold a lot of water after the water was turned out of the canal.

The Court: The Court at this time will suspend until Monday morning at 10:00 o'clock.

(Whereupon, at 11:40 o'clock a.m., Friday, June 11, 1948, the trial of the above-entitled cause was suspended, the Court taking an adjournment to 10:00 o'clock a.m., Monday, June 14, 1948.) [294]

Monday, June 14, 1948, 10:00 A.M.

The Court: The witness resume the stand.

ALLEN C. MERRITT

thereupon resumed the stand as a witness in behalf of the plaintiffs herein and was examined and testified further as follows:

The Court: Proceed with the cross-examination.

Cross-Examination

(Resumed)

Mr. Veeder: Your Honor, it would be helpful if I would approach the exhibits to point to several of them.

The Court: All right. If you do that, everybody keep your voices up so we can all hear.

Mr. Veeder: Yes, sir.

The Court: That is the danger about getting close to the exhibits.

(Testimony of Allen C. Merritt.)

Q. (By Mr. Veeder): Mr. Merritt, I wish to refer to Plaintiffs' Exhibit 70 and inquire of you as to the relative location of the stratum shown in that exhibit as it relates to the place of the break.

A. I believe it is about, oh, maybe 1500 feet north of the break where that——

Q. Well, along the canal how far do you think it would be? [295]

A. Well, I couldn't estimate that, but it must be four thousand feet or more along the canal, maybe five.

Q. It might well be a mile?

A. Well, possibly, along the canal, yes, sir.

Q. It is downstream from the break, is that correct?

A. Yes, sir.

Q. Now, would you compare the stratum disclosed in Exhibit 70 with the area in 71, which is at the point of the break, as I understand?

A. I believe they are very similar. I think there shows a little more soil exposed on the bank there in 71, maybe, than——

Q. Well, isn't it true, Mr. Merritt, that this discloses outcroppings of a great deal of sandstone in Exhibit 70?

A. Well, some of it is stone and some of it is just sand.

Q. But it is wholly different from this soil in 71?

A. Oh, not wholly so, no, sir.

Q. Well, this is a different type of——

A. Oh, I don't think I could say there is any

(Testimony of Allen C. Merritt.)

particular difference. Generally, it is the same general formation.

Q. The same? A. That is, somewhat.

Q. Somewhat the same? A. Yes, it is sure.

Q. Would you approach the exhibit, Mr. Merritt, for the purpose of viewing certain strata appearing in your exhibit. [296] Is it not true that the stratum to which I am pointing on Exhibit 70, which is far to the left on that exhibit,—Isn't it true that these two strata approach each other and actually intersect in the picture? This stratum here? Observe this stratum above and this one here (indicating).

A. Yes, sir.

Q. And they do intersect, do they not?

A. Well, I didn't notice anything of that kind.

Q. Well, observe on the photograph now.

A. May I make this—that you mean they come together in this form?

Q. They do. They come together, do they not?

A. Well, I observe—I didn't notice that they did.

Q. Well, do you notice that they do now from the photograph?

A. No, I can't say that they do. The general dip is about the same across there.

Q. But they are not absolutely parallel, isn't that correct?

A. I didn't take any measurements to see that.

Q. Well, can't you observe from looking at it?

A. Well, not, I wouldn't say, from the photograph.

(Testimony of Allen C. Merritt.)

Q. That they designated 70 there. I wish you would refer to this same exhibit.

A. I can't say that I see any great difference in the general veining there.

Q. Well, these two strata as shown in the exhibit, isn't the [297] inclination of the lower stratum much greater than the upper stratum?

A. Well, I don't believe I could testify on that. I didn't make the examination with that observation in view. I merely made these photographs to indicate that there was a bedding.

Q. There was a bedding. Your concern was not whether there was a continuous inclination of all the strata at the same degree? Observe that. Is that not different from that above there (indicating)?

A. It might vary slightly. That is quite a distance from the break, and the inclination as examined indicated the break was somewhat parallel to that——

Q. But there were variations, were there not?

A. Oh yes, certainly.

Q. There must be?

A. As in any formation of that type.

Q. Mr. Merritt, what was the inclination as disclosed by your pervious stratum in Exhibit 80?

A. About nine degrees. There were several measurements and they averaged up close to nine degrees.

Q. And this pervious stratum as disclosed on Exhibit 80 is nine degrees?

(Testimony of Allen C. Merritt.)

A. I think that is what shows on the map.

Q. Will you take this protractor and test the degree of inclination as shown on the map? Is that not 10? Now you [298] have moved the zero up, Mr. Merritt.

The Court: Now, just let him do it, if you are asking him to do it.

A. I believe that the average shown on that plat may vary as much as 20 to 30 minutes in angle, as indicated there, and I do not see any place that that protractor shows over about 9 degrees 40 minutes.

Q. (By Mr. Veeder): There is variation shown between this line here on Exhibit 80 as the stratum progresses up towards the canal, as you describe it; there is variation of the 9 degrees to which you testified?

A. I think I testified to the effect that a measurement was taken from the two points of exposure, the two different points, by taking levels, and that after taking several levels we thought the maximum variation was approximately 42 minutes one way or the other.

Q. But on the question which I have asked you, that as disclosed by this Exhibit 80 which you have entered in the evidence, that there is in fact a variation of the stratum as it progresses toward the canal?

A. Yes, I think there is a variation in the stratum. I believe there is. I don't think that any stratum would be absolutely level or maintain any constant grade or slope.

(Testimony of Allen C. Merritt.)

Q. And variation is disclosed here?

A. Slight variation, yes. [299]

Q. Well, the slight variation in the distance in which you took your levels is highly important, is it not? A. Well, I really can't see it.

Q. Well, would it not make a difference as to where the sandy stratum as you have drawn it enters the canal?

A. I suppose it would if you——

Q. It would?

A. If you project it from a lower point to a higher point in several hundred feet it might make some slight variation.

Q. It would make a variation?

A. Certainly. It couldn't be absolutely true. It doesn't remain true.

Q. Referring to your Exhibit 70, would you describe this work on the lower bank of the North Canal? A. You mean 74?

Q. Seventy-four,—I beg your pardon, 74.

A. Well, it appears to have the bank lined with earth and then stabilized with gravel.

Q. It has a lining in the bottom of the canal, is that correct?

A. Well, the lining in the bottom of the canal is not exposed. On the sides the bank, as shown in that photograph, shows that there is a lining and that it is——

Q. It intervenes between the water and the pervious stratum to which you refer? [300]

(Testimony of Allen C. Merritt.)

A. I hardly think that that is a clear question.

Q. It does cover here the pervious stratum?

A. Well, the bank does. What is in the bottom I don't know.

Q. You don't know? A. No, sir.

Q. Now, referring back to your Exhibit 80, your pervious stratum as shown in the picture discloses that the water is not separated from the pervious stratum, is that not correct? There is no showing, in other words, that there is a lining between the pervious stratum and the water?

A. Do I understand your question that this line represented in 74 was not shown in this (indicating); is that what you mean?

Q. That is correct.

A. Well, this was done for diagrammatic representation of that. We have no question about covering that with this lining. That was merely a diagram to show——

Q. This does not show, in other words, the present status of the bank, the area along here on Exhibit 74 to which I am pointing? This does not disclose that?

A. I did not attempt to disclose that.

Mr. Veeder: Your Honor, I submit that this should be stricken from the record as not disclosing the true status of the canal.

The Court: Oh, denied. He is trying to prove a thesis. [301] As he says, it is for diagrammatic purposes and to illustrate his theory. I understand his theory, if you do not.

(Testimony of Allen C. Merritt.)

Mr. Veeder: Well, as long as the record shows that there is the difference.

The Court: Oh, surely. I understand perfectly what this is all about. If I didn't I wouldn't be competent to try the case. As to whether I agree with that theory or not is a different matter.

Q. (By Mr. Veeder): Do you know the length of the North Canal, Mr. Merritt?

A. No, sir, I do not.

Q. You testified that good practice would have been to line the upper bank of the North Canal, as I recall.

A. I believe my testimony was at this particular point we have under discussion.

Q. What would be the cost of lining that area of the canal?

A. Well, I have made no estimates of cost. There were no questions of cost involved.

Q. Would you state that again, sir?

A. There was no questions of cost involved so far as I was concerned.

Q. Is cost not a factor in determining the type of construction used in a canal?

A. Why, certainly. Economic soundness would be based on the cost. [302]

Q. And it is important, then, in considering the type of construction which you would use?

A. Yes, sir.

Q. Now, in a canal seventy miles in length through an area which you have described as gen-

(Testimony of Allen C. Merritt.)

eral in character, that is, the Idaho and Payette area formation, that would be a very expensive process, would it not, in general?

Mr. Lytle: We object to that as not proper cross-examination and speculative.

The Court: Oh, I think it is all right. It is proper cross-examination.

Q. (By Mr. Veeder): Would you proceed?

A. I wish you would please state the question.

Mr. Veeder: Would you read the question, please.

The Court: Read the question.

(Pending question read.)

A. Yes, it would be expensive, but it may not be necessary the entire length of the canal.

Q. It is a factor, however, in determining whether cost is a factor in making that determination? That is, as a construction engineer, you would exercise your discretion as to whether you lined or did not line the inner bank, depending on——

A. Certainly, that would be my responsibility.

Q. It is a discretionary function of the highest type as to [303] whether you would line both sides of that canal?

A. I would say yes, sir.

Q. It is a responsibility of an engineer—It is a responsibility assumed by an engineer as to whether he lines or not lines, in his discretion?

A. I would say so.

Q. And in making that discretionary determination he must take into consideration the cost factor?

A. Certainly.

(Testimony of Allen C. Merritt.)

Q. The fact that the segment of the North Canal breached stood for approximately eleven years prior to the alleged failure is evidence of reasonable construction, is it not? A. I would say so, yes, sir.

Q. You referred to earth movements in this area, did you not, Mr. Merritt? A. Yes, sir.

Q. Those movements would effect the stratum throughout this area, would they not?

A. Yes, sir, they would.

Q. That makes calculations as to the dip of the stratum rather hazardous, does it not?

A. Well, I think any study of the terrain over which the canal is constructed would necessarily take into consideration any possible previous earth movements in water courses.

Q. The fact that your Exhibit 81 shows a decided fault [304] evidences the hazard in attempting to state with certainty the continuity of the porous stratum to which you refer?

A. I don't quite get your question.

Mr. Veeder: Would you read the question, Mr. Reporter.

The Court: Read the question.

(Pending question read.)

A. I think the exposures shown there would indicate that there might be a dangerous stratum encountered in that construction.

Q. That is not responsive, Mr. Merritt, to the question. The question was as to the hazard of

(Testimony of Allen C. Merritt.)

stating with certainty the continuity of the porous stratum.

A. I would say that would be a matter of judgment on the part of the engineer, to make a statement as to any hazard or the extent of it.

Q. Perhaps you don't see what I mean. There is a disclosure in your Exhibit 81 that within the short space shown on the exhibit there is a variation between the two segments of porous stratum of perhaps a half-inch.

A. Yes, I believe it shows approximately that.

Q. That evidences a fault, in other words, in the stratum in question?

A. Well, there is a difference at those two points. That may be due to the rake of the formation across the map or along the slope, or it may be due to a movement in the underground [305] or separating formation.

Q. All of which would affect the continuity of the stratum?

A. Certainly.

Q. And what was the strike of the stratum that you depict on the Exhibit 80?

A. Oh, approximately north and south.

Q. Did you ascertain the strike?

A. Well, the strike varies.

Q. Well, did you ascertain the strike?

A. No, only approximately exposed.

Q. How did you ascertain the strike?

A. It is exposed in Exhibit 73 as almost parallel with the water line; in Exhibit 74 it shows it exposed, and in Exhibit 77.

(Testimony of Allen C. Merritt.)

Q. Well, what is the degree of strike in that stratum?

A. The strike is supposed to be in a level plane.

Q. Do you think that this strike is a level?

A. Well, I would say that it follows the contour of the country generally, this formation does.

Q. The contour of the country in general, though, is not on a flat plane, is it?

A. Oh, no. It slopes toward the valley.

Q. Are you acquainted with Lahee as an authority on geology?

A. Yes, I have Lahee's book.

Q. You accept him as an authority on it? [306]

A. Yes.

Q. Would you agree with this statement made by Lahee,—and I am quoting from his text on Field Geology, Page 460: “Unless the strike of the inclined bed is known and the measurement of a dip is made at right angles to the strike, the observed inclination obtained as described above will not be the true dip; it will be a component of the dip measured in a certain direction not perpendicular to the strike.” Do you agree with that statement?

A. I believe that is a pretty good statement, yes, sir.

Q. In other words, if you don't have the inclination—If the degree of the strike was not known, you could not ascertain the dip with any certainty?

A. I think that is a generally accepted principle in geology. The reference there, I would say, is more in the nature of mining geology, where strikes and dips are more pronounced.

(Testimony of Allen C. Merritt.)

Q. Well, is it not, in showing the dip as you have on your Exhibit 80? Unless you have the strike it would simply be the component of the dip, it wouldn't be the true dip?

A. I think that is—I think that is right.

Q. In other words, one factor, namely, the strike, was not known when you arrived at what your conclusion of what was the dip of that stratum?

A. I think I testified that the exposures indicated in 77 and 73 exhibits gave a general idea of the structure. It [307] followed approximately the axis of the canal.

Q. That, Mr. Merritt, is not responsive to the question. The question was whether you had determined the degree of inclination of the strike prior to arriving at your conclusion with respect to the dip?

A. I believed that I had assumed the strike did——

Q. What was the degree of inclination that you assumed?

A. I don't believe that I took the angle of the exposure in the canal. I have shown it by difference in elevation only.

Q. The proposition which I quoted into the record from Lahee was not compliant to that proposition as to the method of reaching the inclination of the ditch, is that correct?

A. I believe that that expression is generally accepted as a basis for determining those matters when exactness, extreme exactness, is essential, but

(Testimony of Allen C. Merritt.)

in this case very exact measurements were not essential. They easily could have been made. The questions involved did not seem to me to be essential that great accuracy in determining those factors was essential.

Q. Well, is it not essential in the construction of a canal to know whether a stratum of porous materials enters or does not enter the canal?

A. I think that is right, yes, sir.

Q. Is it not possible that—Is it not probable that if the degree of the dip were different on the stratum in question that it would pass well beneath the bottom of the canal? [308]

A. My observations indicate that it was exposed in the bank of the canal.

Q. But if there was a variance on the degree of the stratum it might pass beneath the canal?

A. Yes, that might be the case.

Q. You made no drillings to ascertain definitely that it was the same stratum?

A. It was the same——?

Q. The same stratum which you observed in the hillside bank of the canal?

A. And what other stratum?

Q. Well, and the stratum to which you testified which is disclosed on the exhibit?

A. Well, I, of course, did not have any opportunity to drill into that, but the exposures at two points are indicated on this Exhibit 80.

Q. You took just two outcroppings, however, in making that ascertainment?

(Testimony of Allen C. Merritt.)

A. Oh, no, not by any means. We took several.

Q. But you did not try to ascertain that the same stratum which you indicate on the upper bank of the canal proceeded throughout as you depict it in Exhibit 80?

A. I didn't take any drillings.

Q. Can a stratum be both permeable and exhibit capillarity at the same time? [309]

A. I think that would be a very hard thing for me to answer. It would vary with all the material involved.

Q. Would you say that again, sir?

A. It would vary with the material involved.

Q. The material involved here in the stratum is very permeable?

A. Yes, sir, I would say it was permeable. I wouldn't say very permeable.

Q. What is the—Go ahead. Would you finish what you were saying?

A. I didn't state it was very permeable. I said it was a permeable stratum.

Q. The capillarity of that stratum is reduced by reason of its porosity, is that not true?

A. To a certain extent, I would say so, yes, sir.

Q. It would reduce the amount of capillary action which would cause the storage in the upper bank to which you refer?

A. Well, I would hardly say that the storage was dependable on capillarity. It may be due to gravity flow of the water.

Q. I didn't get that.

(Testimony of Allen C. Merritt.)

A. It may be due to flow by gravity of water into the stratum.

Q. Do you say that water flowed into that stratum which sets at 9 degrees?

A. Well, there are openings in it. [310]

Q. But does the water flow into it and reservoir in there?

A. Well, that is something that I was unable to determine, but from indications on the surface it certainly must have stored or absorbed, by some means, either by reservoiring or capillarity, a certain amount of water.

Q. Can you estimate the amount of water that would be stored?

A. No, I haven't made sufficient investigations to determine the degree.

Q. How would the water return from the upper bank of the canal to the stratum disclosed on the lower bank, in view of the fact that your picture, your Exhibit 80, discloses the stratum cut, intersected, completely by the canal, and the fact that your Exhibit 74 discloses the canal is lined?

A. May I try and clarify that by stating that the lining is definitely on top of the stratum and that——

Q. May I ask, the line,—what line is that?

A. The lining.

Q. The lining.

A. ——indicated on 74 lies on top of it.

Q. That is correct.

(Testimony of Allen C. Merritt.)

A. And, undoubtedly, from the testimony I have heard here, there was a trench cut through this porous stratum to cut off any flow when the break was repaired, and that bank has been built on top of it, which was good practice. The other bank is [311] still exposed to the percolation and possible flow of water, the extent of which we were not able to determine. I never saw the canal before March at that point.

Q. I hate to be pressing you, Mr. Merritt, but you still do not explain how the bank storage can enter the sealed-off stratum below the canal.

A. It will be observed, as I have mentioned in 74, 77 and 73 that there is a slight rake to the formation upstream in the canal. If that continues for some distance to the south the water could flow by gravity.

Q. That would not be at the break, however, Mr. Merritt?

A. That is something that I am not in a position to say, because I had no means of tracing it other than the indications of moisture on the hillside below the ditch.

Q. Did you, when you were there in March, observe any water in the canal that would be attributed to storage in the upper bank? A. No, sir.

Q. What becomes of upland precipitation, that is, the rain and the snow in the back hills, the upland beyond the canal?

A. Well, I presume it flows by natural water courses off to lower elevations.

(Testimony of Allen C. Merritt.)

Q. Does it not enter the ground and become ground water?

A. Oh, I think that is the case, yes.

Q. There is an inclination, is there not, towards the river? [312]

A. Yes, sir.

Q. And the water would proceed down from that back-hill country, would it not?

A. I would say so.

Q. And is it not possible that it would arise to the surface as it approaches the lower levels of the valley of the river?

A. Yes.

Q. It might cause what appears to be springs and seepage?

A. Oh, yes.

Q. In passing along the canal did you observe structures placed beneath the canal along the natural draws to handle natural precipitation?

Mr. Lytle: I object to that as calling for a conclusion on matters not in evidence.

The Court: Well, I think it is proper cross examination of an expert witness to ask him about a conclusion about 'most anything in connection with the subject.

A. To clarify the question, do I understand that you mean structures to carry waterways under the canal,——

Q. (By Mr. Veeder): Yes, sir.

A. ——or across the canal?

Q. No, no, I don't mean across it. I mean under it.

A. I didn't see any structures of that kind in the vicinity of this break.

(Testimony of Allen C. Merritt.)

Q. Did you observe, were you looking for, any such structures? [313]

A. Yes, I was around in the draws and other places where there was evidence of moisture.

Q. But you did not observe any?

A. I didn't see any structures that I would say were designed for that purpose.

Q. Would you state where the canal is located with reference to the point at which you were standing when you took the picture across there in 79?

A. I was above the canal.

Q. About how far would the canal be from the point at which you took the picture?

A. I think we noted around 200 feet or such a matter above the—that is, west of the canal.

Q. Now, referring to your Exhibit No. 82, there is that farm ditch down below, is there not? That is drawn in there?

A. Pardon me, I didn't understand.

Q. I say, there is a farm ditch drawn into your Exhibit 82 which appears to really surround the seeped area to which you refer?

A. There is a small ditch there, yes, sir.

Q. And on that ditch there were located some trees, were there not?

A. Yes, sir.

Q. Is that one of those trees—you might step to your Exhibit 79—is that not one of the trees on the ditch, the [314] farmer's ditch, that tree immediately in front of the camera?

A. This (indicating)?

Q. That tree there, yes, sir.

(Testimony of Allen C. Merritt.)

A. That is below the ditch, yes, sir.

Q. That is below the farmer's ditch?

A. Oh, I don't know about that. I wouldn't testify to that.

Q. That tree, however, is at east two hundred to three hundred feet from the camera?

A. Well, I wouldn't be able to say that. That tree may be some distance below the canal.

Q. It may be some distance? A. Yes, sir.

Q. That is all on that question. You have stated that the stratum varies in porosity, have you not?

A. Yes, sir, I think it does some.

Q. At some points it is rather tight, is that correct?

A. Well, I would not be able to say that, the degree of tightness, what is meant by "rather tight," or the degree of porosity. I could not——

Q. A sandstone stratum, however, might be sufficiently tight or sufficiently impervious that constructing across it might be good practice?

A. Well, I think that would occur in various localities along the canal. If in the judgment of the engineer he decided that it was sufficiently tight he could construct his [315] canal across it.

Q. And it would be a highly discretionary determination on the part of the engineer, viewing it upon the ground where he stood, whether a treatment would be necessary; is that not correct?

A. His judgment would have to be depended upon, yes, sir.

(Testimony of Allen C. Merritt.)

Q. It is a discretionary matter by the man in charge of the construction?

A. Well, it would depend entirely on how the construction was carried on, whether it was discretionary for him to make changes in the specification or the design at the time the construction was in progress or whether he would be required to carry to a certain line or certain depth regardless of that sort of thing. That is something that I couldn't answer.

Q. You couldn't answer?

A. That is what I would say would be the case if I were handling it.

Q. It would be a determination on your part?

A. Yes, sir, I would say, or a recommendation at least.

Mr. Veeder: That is all.

Redirect Examination

By Mr. Lytle:

Q. You have testified that this area was a lake bed. Now, what area, in general terms, are you referring to in that description? [316]

A. Well, the various formations generally named for a formation. Are you referring to the name that is applied to this area?

Q. No, the question, Mr. Merritt, was, that in your cross examination and in your direct examination you named this area, you said this area was known as lakebed. Now, what area do you mean?

(Testimony of Allen C. Merritt.)

A. I mean the area surrounding this valley around the Snake River, back up towards Payette, in that area in there, and on down the valley, has at one time been a lakebed, generally accepted by geologists that that was the condition.

Q. And you also mentioned some streams. Now, as I understand you, the streams in the area and the lake in the area, were they concurrent or were they covering different periods of time?

A. The streams are the remaining water courses after the lake has subsided.

Q. Yes. I call your attention to Plaintiffs' Exhibit No. 80. Is that incline of approximately the same incline as indicated in other points along and above the canal zone?

A. Yes, sir, it corresponds closely to the exposures in 70 and 79.

Q. Now, referring to No. 70, and noting the incline evident in that picture, in what direction is that incline pointing?

A. Approximately east, toward the valley. [317]

Q. Is—are the incline shown in 70 and the incline in 80 comparable one to the other?

Mr. Veeder: I object, your Honor. The witness has testified that he took the picture for a general purpose and made no specific investigation of the area depicted in 70.

The Court: Maybe he will say something else now. He has a right to testify on the subject. You went into it in cross and he has a right to ask

(Testimony of Allen C. Merritt.)

redirect questions on the subject. That is a matter of argument, Counsel, of the view you take of it. I may take a different view of it. I am not saying that I do. Anyhow, he has a right to testify on the subject that was raised on cross. Go ahead.

A. I believe I testified that the first picture that I took was No. 79, with the idea of indicating the general dip of the formation at that point, not that the photograph shows the exact dip, but measurements on that dip taken by me and Mr. Bronken indicate that the dip of the formation exposed in the wash and in the bank of the canal are approximately the same. I believe I testified the variation, according to several measurements, amounted to 42 minutes of angle.

Q. (By Mr. Lytle): I call your attention to Exhibit No. 81. You have indicated differences in level or altitude of the two faces of the stratum, the one on the west side of the canal and the other on the east. What would that indicate?

A. Pardon me; do I understand you to say on the west side of [318] the canal and on the east side of the canal?

Q. Well, on the one on the left side of the drawing and the other on the right side of the drawing.

A. Oh. Yes, sir, there is an indicated dip in elevation there.

Q. Would that give any other indication to you?

A. Yes, sir; the object of that sketch is to indicate that there is a difference in elevation between those two points in the exposure in the canal bank.

(Testimony of Allen C. Merritt.)

Q. And what could occasion that?

A. Possibly some earth movement.

Mr. Lytle: Mr. Bailiff, I wonder if we might have that board with the three exhibits turned over so I can see it this way.

Q. Calling your attention to Exhibits Nos. 68 and 69, did you find any other evidences of earth movement or movement of the stratum?

A. I believe that is indicated in Exhibit 73.

Q. Do you find any further indication of that in 68, back of you?

A. I think it is indicated about the center of the photograph.

Q. And what is disclosed there?

A. There is some gravel embedded in the formation and falling out of it, disintegrating.

Q. Well, what is meant by the strike of a stratum? [319]

A. I think it is generally conceded that it is the horizontal plane that the slope intersects, the point where the slope intersects a horizontal plane.

Q. And what is meant by the dip?

A. It is the slope of the formation across that plane.

Q. And what is meant by the rake?

A. Where the formation would vary in its contour. The slope might form a curved surface and in crossing that surface there would be a dip, possibly, up on one side and down on another. That would be the rake if the dip was taken, say, at a central point in that. The rake would follow approximately the

(Testimony of Allen C. Merritt.)

same direction as the strike but somewhat vary from it. Rake is a term that has been applied rather indefinitely to fit that condition.

Q. Now, using words that I can really understand, in what direction is the incline downward of this strike?

A. The dip is east and the rake as we found it is to the south somewhat.

Q. You stated that you did not take the degree of the incline shown by the pictures taken in the bottom of the canal, but did so by taking elevations.

A. Yes, sir.

Q. Referring to No. 76,—— A. Yes, sir.

Q. ——is that the downstream or upstream end of the stratum [320] which is shown in the pictures and in the proximity of the break?

A. Mr. Bronken is standing at approximately the upstream end.

Q. Now, referring to 74, which end does that indicate? A. That is the downstream end.

Q. And that would be to the north?

A. Yes, sir.

Q. Now, approximately how far north is the narrowest portion toward the background of that picture from the break?

A. The narrowest part of the canal?

Q. No, the narrowest part of the stratum exposed?

A. How far north of the point where the break occurred?

(Testimony of Allen C. Merritt.)

Q. Well, let's get this straight on this. Is 74 looking up or down the canal?

A. Up the canal.

Q. All right. Now, how far from the break is the narrowest portion of the stratum as disclosed in 74?

A. Well, the stratum is only exposed about at the point—about the center of the picture; probably the south end of the break, or very close to it.

Q. Now, referring to 76 again, as we face the figure holding the rod are we looking upstream or downstream? A. Upstream.

Q. Are we looking in the same direction that is disclosed in [321] Exhibit No. 74?

A. Yes, sir.

Q. Now, that stratum exposed there, how does it appear as you go downstream from Exhibit No. 73?

A. Going downstream it narrows down and is covered by the canal bank to a certain extent and rises somewhat above the canal bank, as indicated in 77.

Q. From the point of the break to the area disclosed in No. 70, is the line of the ditch straight or crooked and wandering?

A. It is very crooked and, as shown quite clearly in No. 79, it is a long distance around into those several gulches along there.

Q. And the lineal distance I believe you have given us from the point of the break to the highest point of the incline and outcropping of the stratum as shown in 70 is how far, did you estimate?

(Testimony of Allen C. Merritt.)

A. I didn't measure it, but I should judge it was not in excess of 1500 feet, probably less.

Q. Can you estimate the elevation of the area shown in 70 over the elevation of the canal?

A. I didn't get the question quite clear.

Q. How much higher is the land of the area shown in 70 than the canal itself? Can you estimate it?

A. Well, this is the canal (indicating). [322]

Q. Yes.

A. Oh, it will vary somewhat. It may be, vertically, 50 or 60 feet, maybe more, a little more, than that. I didn't measure it. I would say the point in the center of 70, it might be 60 or 70 feet of slight slope, and down on the right side it isn't quite so high; it is a little more abrupt, the slope of the hill, at that point.

Q. Would you say that the stratum shown in 73 and 76 and 77 and 74 has capillary capacity?

A. Yes, sir.

Q. Now, what would you say of the exposed area as shown in 73 beneath that stratum?

A. Well, I would say it was porous, it might provide an open channel for flow of water.

Q. In other words, do I understand you that that would accept a flow of water rather than receive a flow of water?

A. Yes; I climbed up that bank and ran my arm in a hole there as far as I could reach. It was open.

Q. What is the distance between the point in 68

(Testimony of Allen C. Merritt.)

where you last observed this exposed stratum and the stratum exposed in No. 73?

A. Oh, it is about 140 or 150 feet; a hundred and fifty, maybe a little more than that. The No. 80 exhibit is to scale, so far as the distance between the point where it is exposed in the cut and where it is exposed in the bank. [323]

Q. Now, the exposure in 68, is that the exposure closest to the canal, or did you find an exposure closer than that?

A. Well, there is—I would say that is practically as close as the—that is the left fork of the wash.

Q. Pointing to Exhibit No. 82?

A. Yes, sir. The right fork is practically the same distance from the canal.

Q. Yes; and that distance to the exposure on the mountainside bank of the canal was about how much?

A. From that point to that point (indicating) was about 150 or 160 feet.

Q. From the examination you have made of the area in general and the detailed examination you have made, is it probable that there would have been much if any change in that incline in that distance?

A. Well, I wouldn't think there would be. It would be reasonable. The bedding is pretty even.

Q. On your cross examination you stated that it was reasonable under the circumstances to get water to the lands of the project as this canal is constructed. In that answer were you referring to the

(Testimony of Allen C. Merritt.)

general lay and outline of the system, or were you referring to the particular area under investigation?

A. The general outline of the area.

Q. And if in the process of constructing this canal as laid out you came to an area showing a stratum not only subject to [324] saturation but to a stratum subject to percolation or the flow of water as well, would the exercise of sound engineering require a lining at that point?

A. It would be my judgment it would, yes, sir.

Q. Would you think that would be a matter of discretion?

Mr. Veeder: I object, your Honor,—Well,—

The Court: You asked him that question yourself.

Mr. Veeder: I withdraw the objection.

A. I believe if it was my responsibility to build a ditch like that I would try to take every precaution to see that the water got to the point I wanted to use it.

Q. (By Mr. Lytle): And that precaution would dictate that you would line any pervious or leaky formations, is that correct?

A. Well, that would cover it.

Q. And with that evidence in the canal, in the banks of the canal, would that evidence permit you to reach the conclusion as an engineer that the water in the canal would—that water would reach the land and the canal would serve its purpose without taking some extra precautions in connection with that?

(Testimony of Allen C. Merritt.)

A. I should say that every precaution should be taken that would deliver the water at that point.

Q. What could and should have been done at that point?

A. As I have heard this testimony, there was a bank built across this formation and it washed out and was replaced and [325] a core wall put in it,——

Q. Yes.

A. ——all of which would indicate that underneath the canal there was a weak spot in the formation, and the bank as exposed at the time of my examination seems to indicate the same thing. The upper bank is still exposed, with no lining or protection against percolation or seepage.

Q. Well, is it your opinion that a key trench should have been cut and a core installed in the first instance?

Mr. Veeder: I object, your Honor. There is no evidence that that was not done in the first instance.

The Court: Oh, yes, there is.

Mr. Lytle: Yes, there is.

The Court: Definite evidence that there was no core wall constructed there, definite testimony by one of the witnesses that when the bank was washed out they found no evidence that there had been any core wall before. Go ahead.

A. I would say that it would be a normal procedure to cut a trench and fill it with impervious material under the bank. The conception of the matter is that the dirt is removed from the slope on a sloping side-hill, a bank built from that material

(Testimony of Allen C. Merritt.)

which has not been and can't compact perfectly and laid on a formation on the side-hill; when a weak spot is encountered it would be necessary to take some precaution to prevent seepage in that area. I would say yes, that it is my [326] judgment that a core wall of some sort should have been built through there.

Q. (By Mr. Lytle): And along the mountain side of the canal does that area disclosed along there indicate that anything should have been done?

A. Yes, I would have recommended or insisted, if I had been in charge of the work, that there be a lining placed on that side that was equally as impervious as the downhill side.

The Court: I will say, in that connection, the witness Terhune was the one who testified on that.

Mr. Veeder: Thank you, your Honor.

Q. (By Mr. Lytle): And would the character and nature of the soil and strata in the bank side of the canal be disclosed each year when water was out of the canal?

A. The condition as it existed when I examined it was indicated by these various exhibits, Numbers 73, 79, 77, 74, and it would appear that it was easily observed there.

Q. Can you state or give your estimate of the difference in elevation from the point where you first observed the seeped ground as disclosed in Plaintiffs' Exhibit No. 82 and the area above and west of the canal?

(Testimony of Allen C. Merritt.)

A. Above the canal is clearly indicated in Exhibit 75 as the rim of the bench. Outside of a slight depression immediately back from the crest of the rim, it is fairly level ground, but there is a little depression back there, dry. [327]

Mr. Lytle: Now, I think the witness did not understand my question, your Honor. May I have the Reporter read that question?

The Court: Read the question.

(Last question read.)

A. I believe that is shown in Exhibit 80, these elevation lines, to be 70 to 80 feet above the point where it was exposed in the wash.

Q. (By Mr. Lytle): Do you know the average annual precipitation in this area?

A. Well, I don't have the figures now. I think they are easily available. It is considered an arid region.

Q. Yes. Will you get those figures and have them available at another session of this court?

A. Yes, sir.

Q. Counsel asked you if you made any examination or study to determine whether there were structures beneath the canal to carry mountainside water underneath the canal. Did you find any such?

A. I didn't find any. There may be some along the canal in different localities.

Q. Yes; but in the vicinity of this break I believe you testified you saw live water in March.

A. Yes.

(Testimony of Allen C. Merritt.)

Q. Did you follow or observe where that water came from? [328]

A. Well, it appeared in the bottom of the gulch below the ditch bank.

Q. Was there any structure at that point underneath the ditch?

A. I didn't see any. There was none on the downstream side, and certainly was none on the upstream side of the ditch, where it was banked on both sides to carry it across the canyon.

Q. Did the strata as shown in 73 and 79 appear of the same type and character?

A. Yes, generally.

Q. Referring to Exhibit No. 82, where did you observe the evidences of greatest seepage?

A. From this line, which is the——

Q. When you say "this line," identify it with some exactitude.

A. This line parallel and some 40 or 50 feet from the canal bank, east of it, and south and along to the east-and-west line, following a slight elevation, ridge, across on the north side of the wash, along this irregular line which represents approximately the north boundary, and down to the east side,—it indicates that there was an excess of moisture there. Weeds and other vegetation were present. At the south boundary was a fairly good stand of alfalfa. There was some——

Q. You mean, when you say "south boundary"——

(Testimony of Allen C. Merritt.)

A. Of the tract I have just described. [329]

Q. Uh huh.

A. There was a fairly good stand of alfalfa there.

Q. Will you take a pencil and indicate by a cross or a series of crosses the area of greatest saturation or seepage?

A. I believe that I have attempted to do that in this area that I have just described represented by the line on the exhibit.

Q. All right. Now, within the boundaries of the outline would you say that all of that ground was saturated to a similar or like degree?

A. At the times that I was on the ground there wasn't any particular water standing in it. There was indication that ordinary crops could not exist on that, due to the excess water; and also in the wash, by putting your hand into the edge of the sand stratum it was still moist, and was on Friday, —I examined it again—wash was still moist in that area.

Q. In the course of your examination of this area were any porosity tests taken by you or your associates with you in study? A. Yes, sir.

Q. Just show what was done.

A. Oh, we took samples of the material and placed them in the water to show the effect of moisture on them.

Q. Who other than yourself conducted those tests? [330]

A. Mr. Bouton.

(Testimony of Allen C. Merritt.)

Q. Would the fact that leakage occurred along this section of the stream to the extent that below the canal there was live or moving water indicate anything, from an engineering standpoint, what should be done with relation to this area adjacent to the leaks?

A. I would say I would make an examination as to the stability and porosity of the canal banks, to make such repairs as necessary.

Q. What would be needed to be done from an engineering or construction standpoint?

A. I believe I testified that it would indicate that a lining should be placed on both sides of the canal, instead of just one side.

Q. Yes. The testimony discloses that the valley or lower side of the canal is now lined. It is your opinion that if the mountain side of the canal were also lined it would stop this leakage condition?

The Court: Oh, no, Counsel. You have just covered that half a dozen times in this examination, on both sides. He testified very definitely that that side should have been lined and he considered it a definite essential in construction and in maintenance. I don't know what more you want out of it.

Mr. Lytle: Yes, I am probably carrying coals to Newcastle.

The Court: After all, I listened to the testimony; I know [331] what is in the record. There is no use covering it three or four times.

Mr. Lytle: That is all.

(Testimony of Allen C. Merritt.)

Recross-Examination

By Mr. Veeder:

Q. You stated that you were able to reach into this stratum of porous material. Isn't that indicative that it would not retain water for any great length of time? Wouldn't the water run out of there very rapidly and the water subside in the canal?

A. Well, it might also indicate that it might run in the opposite direction into the stratum. It is open and may be a water course, for all we could tell.

Q. Would it proceed uphill in the stratum?

A. Not on a gravity flow, it wouldn't flow uphill.

Q. The capillarity of it is very low, is it not?

A. I wouldn't say that, no, sir.

Q. Once again I ask you how the water would proceed from that stratum in the upper bank of the canal disclosed in 80, Exhibit 80, Plaintiffs' Exhibit 80, and get into the porous stratum below the canal?

The Court: Well, I am going to stop that, too. That subject has been covered about half a dozen times. I know all that he is going to say about it, and I think you do, so let's stop that. [332]

Q. (By Mr. Veeder): At what time did you observe live water in the wash created by the break in the canal?

A. I did not testify that I observed that at all.

Q. Then in what gulch was that?

(Testimony of Allen C. Merritt.)

A. It was in the gulch to the north—two gulches to the north, in which live water existed.

Q. How far above the place where the break occurred—

A. I beg your pardon, the gulch downstream—It is shown in Exhibit No. 70—that gulch there; and in No. 75 there is a draw there that there is some live water in.

Q. How far from the break?

A. Well, on the axis of the canal I would not be able to say. I suppose three or four thousand feet around the meanderings of the canal, but in a direct line perhaps 1200 feet or such a matter.

Q. Well down below the break?

A. Downstream, down the canal, some distance.

Q. That is correct? A. Yes, sir.

Q. That would not arise, that is not directly below the pervious stratum to which you referred and in which you ran your arm?

A. Oh, no, not—East of it? No, that flowing water, that is in those canyons north of the break.

Q. A wholly different area from the break?

A. No, except that I would say the geographical symptoms are similar.

Q. But well downstream?

A. Oh, yes, down some distance.

Q. Have you observed the crops in the field immediately below the break?

A. Right immediately below the break we made the measurements indicated in No. 82.

Q. Was there live water in that area?

(Testimony of Allen C. Merritt.)

A. Not at the time we made the pictures, no.

Q. Is there live water there now?

A. Not that I know of.

Q. Is that area seeped now?

A. I didn't see any evidence of running water, excepting the sand shown in the stratum in 69, anywhere along the sides of it and at the head of it, it is quite moist at the present time.

Q. There is no seep in the field, however, at the present time? A. No, sir.

Q. Would you describe the condition of the ground at the present time immediately below the break?

A. Well, I stopped there on my way back to Boise Friday and looked at it and it still seems to indicate that there is an excess of moisture there, so far as vegetation is concerned. [334]

Q. Is the land dry at the present time?

A. No, sir, not exactly dry, it is not.

Q. Not exactly dry? A. No, sir.

Q. What is the stratum immediately below the topsoil in the field described here in your Exhibit 82?

A. Oh, it varies somewhat. It is indicated in 69 as a series of thin calcareous deposits on the sand and on the soft sandstone.

Q. That is a lime formation?

A. Yes. This white here I think indicates it very closely.

Q. That is the layer immediately beneath the topsoil?

(Testimony of Allen C. Merritt.)

A. Well, it isn't a continuous layer. It is in narrow, very thin bands in the formation.

Q. What is the porosity of that?

A. Well, I would not be able to say exactly, but it looks as if the wash, when it cut down through the formation, seeped at some points on that, and in other cases it went through it. As indicated in 69, at this point (indicating) it went below it. It appears that the stratum immediately under it is nearly all sand, partly stone or rock.

Q. There is a lime there, or calcareous—

A. Oh, scattering spots throughout.

Q. That would tend to hold any moisture entering the topsoil, retain it in the topsoil, would it not? [335]

A. Well, I don't think the conditions there indicate that.

Q. In the field, now, to which we refer?

A. I don't think the indications are that that was the case. That is not entirely impervious, because it is spotted and open in spots. The wash has cut through it at points. If I might explain it a little further, it is clearly indicated in 77 in the center, where the prospector's pick is sticking in the bank; also in 73.

Q. Those are areas on the canal bank, though, are they not?

A. Yes, sir, but it indicates that calcareous formation.

Q. What about the calcareous formation in the field?

(Testimony of Allen C. Merritt.)

A. Well, it is broken up. It is not continuous by any means.

Q. Is there a crop on that land immediately below the break, as appears in your Exhibit 82?

A. Well, I wouldn't call it a crop, no, sir.

Q. What would you call it?

A. Why, I would just say it was weeds and wasteland.

Q. Is there any clover growing there?

A. Oh, here and there, a little bunch; nothing that could be called a crop. A few little spots.

Q. What is the condition of the land right there?

A. Well, it hasn't been tilled for some time.

Mr. Veeder: I have no further questions. [336]

Further Redirect Examination

By Mr. Lytle:

Q. You stated that you saw live water in places north or downstream from the break. Did you examine north of the break to ascertain if there was any live water—or south of the break?

A. Yes, sir, I did.

Q. And about how far distant from the break was that?

A. Oh, possibly a third of a mile or such a matter; maybe it was half a mile.

The Court: Well, as a matter of fact, isn't there some live water in the field right next above this field that is shown in 82? A. Yes, sir.

The Court: Where does that come from?

A. Well, I couldn't tell. It is a spring and evidently comes from the formation.

(Testimony of Allen C. Merritt.)

The Court: Do you think that has anything to do with this situation?

A. Well, there is a possibility.

The Court: What is your opinion as to where that water comes from?

A. My opinion is that it comes out of that same porous stratum that the canal cuts.

The Court: Do you think if the inner bank was lined that [337] that water would stop, too?

A. I would say that would be my judgment, that it should be done there.

The Court: All right, go ahead.

Q. (By Mr. Lytle): That lime-like material that you observed, what is the thickness of that?

A. Oh, it is very thin. It is just in little spots throughout the other formation and is as thin as a sheet of paper and sometimes it would be maybe—I didn't see anything more than a half-inch of it.

Q. Is that solid or broken?

A. Oh, it is broken up, spotty, not continuous.

Mr. Lytle: That is all.

Mr. Veeder: We have no questions, your Honor.

The Court: All right, you are excused.

(Witness excused.)

Mr. P. J. Gallagher: Call Mr. Bouton.

The Court: I didn't interfere with this last witness, but I think you can make faster progress than we have been doing. We have been mulling around with this examination. I think you can move faster now.

JAMES W. BOUTON

was thereupon produced as a witness in behalf of the plaintiffs herein and was examined and testified as follows:

The Clerk: State your name, please.

A. James W. Bouton.

The Clerk: How do you spell the last name?

A. (Spelling) B-o-u-t-o-n.

(Witness was thereupon duly sworn.)

Direct Examination

By Mr. P. J. Gallagher:

Q. What is your age, Mr. Bouton?

A. Seventy-one.

Q. What is your business or profession?

A. Civil engineer.

Q. And where do you live? A. Boise.

Q. Boise, Idaho? A. Beg your pardon?

Q. Boise, Idaho? A. Boise, Idaho.

Q. And how long have you been practicing your profession? A. I began in 1906.

Q. And has that been more or less continuous ever since?

A. No. I was on a farm and connected with a machinery house for approximately fifteen years during the intervening time. [339]

Q. Generally speaking, what type of engineering work have you been engaged in when you were doing engineering work?

A. Well, I have had various types, mostly hydraulic.

(Testimony of James W. Bouton.)

Q. By hydraulic you mean having to do with irrigation, drainage, and other water resource work?

A. That is right.

Q. Will you give us the years, approximately, and the extent of time that you were engaged doing hydraulic engineering?

A. Could I refer to a list that I have here?

Q. Yes, if you wish.

A. From November 1st, 1908, to February, 1911, I was employed as an engineer for the Twin Falls North Side Land and Water Company. February, 1911, to 1913 I was an engineer, office engineer, for the Twin Falls-Salmon River Land and Water Company; and in Nineteen—There is a time, then, from about August, 1913, I went back to the Oregon Short Line on a survey of their railroad. Then I went on a farm and was in farming operation until 1924, and I left the farm and I was connected with machinery sales until 1932. Then from 1932 to 1936 I was engaged as an engineer in the investigation and design of structures and canals for the irrigation of the proposed Bruno Project, involving an earth-filled dam, earth and rock, 550 feet high, in the Snake River Canyon near Bliss, Idaho. At that time we ran out and computed 125 miles of irrigation canals, until 1936. Then from 1936 to—No, 1939, I was [340] employed by the Federal Government on emergency flood control on the Boise River. Then from August, 1939, to December, 1939, I was employed as an engineer by the U.S. Geologi-

(Testimony of James W. Bouton.)

cal Survey, Water Resources Division, to make a survey of their underground flow of water up in Northern Idaho, Bonner's Ferry. In 1940 I associated with Raymond J. Briggs and have been associated with him ever since.

Q. Raymond J. Briggs is an engineer, the head of a group of associates, in Boise?

A. That is right.

Q. And since that time have you done any hydraulic engineering or designing and, if so, on what project?

A. Yes. I took the examination before then for an engineer's license in the State of Idaho and also obtained a civil engineer's license in the State of Oregon by reciprocity.

Q. What I wanted to know was, since you have been with Mr. Briggs' outfit have you continued to do consulting and designing work for irrigation projects?

A. Yes.

Q. And what project particularly?

A. Well, I designed and reconstructed the water works system at Challis. I supervised the water works system of Fairfield, Idaho—Challis is in Idaho. I made an investigation and computed the cost of revising the water system at Shoshone, Idaho. I designed the construction of the sewer treatment [341] plant for the village of Mountain Home. I designed and constructed an extension sewer for the City of Buhl, Idaho. Am at present investigating the possibilities and the cost of a

(Testimony of James W. Bouton.)

dual water system for Buhl, Idaho. I made an investigation for the Emmett Irrigation District for the enlargement of their main canal system and the removal of approximately 500,000 cubic yards of earth which was sliding down into their canals, interfering with the flow of water.

The plans and specifications for these projects, where necessary, have been approved by the Reclamation Department of the State of Idaho.

Q. Let me ask you if you have done any work for the King Hill Irrigation District?

A. I have been connected as consulting engineer for the King Hill Irrigation District since 1942.

Q. Now, in covering that period of time, Mr. Bouton, have you supervised or have you been interested in the construction of canals of comparable size to the canal involved in this controversy?

A. Well, most of my supervision and construction work has been done for the King Hill Irrigation District, where we have had to make changes regarding conditions that existed and are at the present time existing in the King Hill Irrigation system.

Q. So the Court may get some idea of the King Hill project [342] as compared in size to this one, let me ask you if the canals there have any relation in size to the North Canal you found on the Owyhee Project?

A. The main canal itself, similar.

(Testimony of James W. Bouton.)

Q. And what is the nature of the problems that you have to meet in the King Hill Project?

A. Similar to that condition that exists right there.

Q. Did the King Hill people have a lot of leakage in their project for some time?

A. They have had a lot and do have at the present time.

Q. King Hill is on the Snake River and immediately above Mountain Home?

A. Yes, above Glenn's Ferry.

Q. I meant Glenn's Ferry. And do the ditches and the canals in the King Hill Project traverse territory very similar to that which you encountered here on the North Canal of the Owyhee Project?

A. Well, there is a similarity there, yes.

Mr. P. J. Gallagher: Now, I have gone into his qualifications and am going into another line of examination, your Honor. It is a little after twelve.

The Court: Yes. Well, I will permit you to stop now, but I suggest that you take advantage of the noon hour and organize this examination so it will not drag.

Mr. Gallagher: Yes, I will do that. [343]

The Court: We will recess until half-past one.

(Whereupon, at 12:00 o'clock P. M., Monday, June 14, 1948, a recess was had until 1:30 o'clock P. M.)

Afternoon Session—1:30 P. M.

JAMES W. BOUTON

thereupon resumed the stand as a witness in behalf of the plaintiffs herein and was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. P. J. Gallagher:

Q. Mr. Bouton, when you left the stand just prior to the noon adjournment we were talking about your qualifications as an engineer. I want to ask you one further question on that point. In your experience in designing and construction, designing or construction, of irrigation systems, have you run into structures similar to the construction here under construction? A. Similar to it, yes.

Q. Now, you have visited this area where the break took place in the Owyhee Canal?

A. Yes.

Q. Were you there on each of the two occasions with Mr. Merritt, or were you there at different times?

A. I was over there twice or three times with Mr. Merritt. [344]

Q. And was that before the water was turned into the canal?

A. Twice before the water was turned into the canal.

Q. Twice; and once afterwards? A. Yes.

(Testimony of James W. Bouton.)

Q. Now, Mr. Merritt has testified as to these exhibits that are now put upon the board, the photographs. Were you there with him at the time the photographs were taken?

A. I was not with him. I was there the day he took the photographs, but I was not with him when he was taking the photographs.

Q. I see. You were doing something else yourself? A. Yes.

Q. Do these photographs, in your opinion, represent about the conditions you found there when you made your examination?

A. So far as my examination was concerned, they do.

Q. Did you pay any particular attention to the formations found in the photographs, shown by Exhibit No. 73, for instance?

A. Seventy-three—Is that——

Q. That is down here, back of the Reporter.

A. Yes; I came down the canal at the time Mr. Bronken was standing there with the rod.

Q. Did you make any personal examination of the stratum that is shown there near where Mr. Bronken is?

A. Yes, in that it is a very porous formation.

Q. You never saw the ditch before the break?

A. Never did.

Q. And you did not see the ditch before they put in this sealing on the downstream side?

A. I did not.

(Testimony of James W. Bouton.)

Q. How long is the structure that we call the porous structure and which is shown in Exhibit No. 73—That is, up and down the ditch?

Mr. Veeder: I object, your Honor. There is no foundation that he made any measurements or any compilations.

The Court: He can answer if he knows whether he has observed.

A. It is approximately 200 feet, I would think.

Q. (By Mr. P. J. Gallagher): Did you give that distance and the area exposed there some consideration, when you made your examinations, in determining its extent and length?

A. No, we didn't measure it very closely, the exact distance, but that porous part was the length——

Q. That is your judgment now, about 200 feet?

A. About 200 feet.

Q. Could you determine whether or not the porous structure on the upstream side of the bank—We will call it the mountain side—whether that extended downstream or north of where the break took place?

A. It does.

Q. And could you estimate the distance that it extended? [346]

A. I would say at least 75 or 80 feet.

Q. What have you to say as to whether or not that whole stretch or length of stratum which you estimate to be 200 feet, whether or not that bank is porous for that distance?

A. I didn't get your question.

(Testimony of James W. Bouton.)

Q. Well, maybe I can shorten it up. Is the bank porous for the full distance that you estimate to be 200 feet north and south there?

A. No, I don't know as it is porous for the full length of it. There's certain conditions there that you can see in the picture that prevented us from getting a view of the bottom of the canal. The material above there has sloughed down and covered up a certain amount of the bank and it is impossible to get above the bottom of that canal over to the porous material unless that was excavated and cleaned out.

Q. I see. Well, could you see enough of the upper side of the canal to say whether or not it was porous out at at least both ends and certain spots in the middle?

A. It was porous at both ends—That is, it is porous beyond both sides of the break.

Q. That is what I mean. Now, did you examine the area below the break in the canal that is shown in Exhibit No. 82, as to whether or not any indication of seepage was visible?

A. You mean at the end of this point right over here (indicating)? [347]

Q. Yes. 82 is this little white paper exhibit over here (indicating).

A. Down here (indicating)?

Q. No, below. The other one, below.

A. Oh, this part here (indicating)?

Q. Yes.

(Testimony of James W. Bouton.)

A. There was no indication of seepage when I was out there.

Q. What have you to say——

A. That is, on this land that I examined.

Q. I see. What was its general condition as to whether or not there had been seepage there, if you could tell?

A. Practically everything appeared to be dead up towards the canal.

Q. That exhibit indicates that that is about 4.3 acres. Would you say from your own observation that that area is about correct as to size?

A. I think so.

Q. Now, was there any living water out there in 1948, when you examined it, seeping or running streams?

A. There was a small amount of water in the bottom of that coulee just north of the canal. The first time I was out there you could see that water, driving along the bank of the canal. I mentioned that to the people that we were with, that there was water in that coulee, in the bottom of that coulee, the first time that we were out there. [348]

Q. Now, later on did you observe water running at any other place adjacent to where the break was?

A. Last Friday, south of the break, and I don't know just how far, but there's about five—I would say approximately five inches of water coming out down below the canal, evidence of some sort of a spring.

(Testimony of James W. Bouton.)

Q. When you say five inches do you mean five miner's inches?

A. Five miner's inches, or about one-fifth—one-tenth of a second-foot.

Q. Was that running into a stream?

A. Yes, my opinion is that it runs into a point down below.

Q. Now, did you make any examination of that mountain side of the bank there so as to form an opinion as to whether or not it would absorb in a reservoir any considerable amount of water over an irrigation season?

A. It will absorb it, be enough water back there, providing there is a storage reservoir back in the hills to hold it.

Q. Now, there has been a lot of testimony in this case as to dips and rakes. Would that have anything to do, in your opinion, with the amount of reservoir capacity that there would be in the north bank—I don't mean the north bank; I mean the west bank of the canal?

A. No, I couldn't form any opinion as to the amount of water that would be stored back there. Not being a geologist or not knowing anything about geological conditions, I couldn't [349] state the amount of water that would be there.

Q. Calling your attention now to Exhibit No. 80, Mr. Bouton, which purports to be a drawing of a pervious area, were you present with your associates at the time the investigation was made on

(Testimony of James W. Bouton.)

which that drawing was based? That is the white exhibit over on this end, on the top.

A. I was not with them at the time they took those levels down there.

Q. You were not with them?

A. No, I was not with them at the time they took those levels.

Q. In your experience as an engineer, and particularly such experience as you have had in designing projects, would it be good engineering or sound and safe construction, in a hillside such as the North Canal, to build the lower side of a canal over a pervious structure without a core wall which would tend to cut off the seepage from the head ditch?

Mr. Hess: Just a minute. We object to that as incompetent, irrelevant and immaterial, the witness not showing himself as qualified, and there is no evidence shown in the record that there has been a core wall built.

The Court: I will overrule that and say that there is a core wall built.

Mr. Hess: I thought the witness, personally, was talking about a core wall that was made at the time of the break, and there is a difference between a core wall and a core lock. [350]

The Court: He said that there was no evidence of any core of any kind in there, and, in any event, I think it furnishes a sufficient basis for asking the question. If it be proved the contrary, then you

(Testimony of James W. Bouton.)

can ask him something else. There is a basis in the record.

Mr. P. J. Gallagher: Can you remember the question?

A. No, I don't remember the question.

Mr. P. J. Gallagher: Will you read it, please.

The Court: Read it.

(Pending question read.)

A. It would not be good engineering practice to build a canal through a pervious piece of earth without some consideration to the fact that it was pervious, and some sort of preventative should have been put in that canal at that time, either a core wall or lining the entire canal, bottom and both sides.

Q. Assuming that there was no core wall there and the ditch was not lined on either side prior to the break, would you say, under the conditions that you found, that that was good construction?

Mr. Veeder: I object, your Honor. There is no evidence that the canal was not lined prior to the break. His assumption is premised on that.

The Court: Well, it it was lined and he says it should not have been built without being lined and you prove that it was lined, then you have proved that one of those precautions [351] had been taken. He may answer.

Mr. P. J. Gallagher: He may have to read that again.

(Testimony of James W. Bouton.)

The Court: Read the question.

Pending question read.)

A. No, it was not.

Q. (By Mr. P. J. Gallagher): From the observations you made there, Mr. Bouton, was there any indication at all that the mountain side of that canal was ever lined at that point?

A. I haven't found any.

Q. While we are on that subject of lining, did you ascertain whether or not there has been lining at other portions of the ditch?

A. Yes, there are a few other places that I observed in about seven or eight miles that I traveled over the canal.

Q. Where are they located with reference to where the break took place?

A. One of them, I think, was in the neighborhood of about 4,000 feet on the center line of the canal below this break.

Q. And where is the other one?

A. Beg your pardon?

Q. And where is the other one in relation to the break?

A. The other one is south of the break. I don't remember now just where it was.

Q. Just so we can locate the one you say is downstream from the break, I will ask you to take a look at Exhibit No. 70 and [352] say whether or not that lining in the canal is on an area of ground shown in 70?

(Testimony of James W. Bouton.)

A. Well, I couldn't say, not knowing the picture, I couldn't tell just where it is.

Q. Very well. A. On this picture here.

Q. Yes.

A. This is the channel where that water is (indicating)?

Q. Yes.

A. Well, I think it is around this point right in here.

Q. And what kind of lining do they have there?

A. Concrete lining.

Q. And could all this area where the break took place be lined with any other material other than concrete in a manner to prevent leakage?

A. We do that sometimes, take an earth impervious material and enlarge the canal sufficiently to put this lining in and probably tamped wet or dampened.

Q. Have you examined the lining on the downstream side of the bank at the point where the break occurred in its present condition?

A. Only by observation. I didn't make any examination through the bank.

Q. Yes, I know; but could this same type of lining be placed on the up or mountain side of the canal? [353]

A. By removing a certain amount of earth there it could.

Q. That is, you mean by grading back the bank there so you can get a proper slope to your lining?

A. That is right.

Q. Would that be an expensive thing to line that

(Testimony of James W. Bouton.)

canal for that short space? What I mean by that, comparatively expensive?

A. No, I don't believe it would be very expensive for the size of the project. When you take into consideration the size of the project and the amount of money spent on that, I think it would be a reasonable cost.

Q. What have you to say as to whether or not it would save a large amount of water?

A. Well,——

Mr. Veeder: I object to that, your Honor. That is an irrelevant question. That matter of saving water is not at all involved in this case.

Mr. P. J. Gallagher: Maybe that is true.

The Court: I may say, in that regard, that, although it is stated in one of the contentions, I think that probably the cost is irrelevant, too.

Mr. Veeder: The cost, your Honor?

The Court: Yes.

Mr. Veeder: It is my understanding, your Honor, that in the State of Oregon one of the important factors in a question [354] of negligence in the construction of a canal is the very question of expense, one of the elements.

The Court: You are not dealing with the State of Oregon. You are dealing with the question of whether the Government of the United States is negligent under these circumstances. But I think the question—I say it is a preliminary consideration, and I think the question of cost is immaterial. I am not ruling on it at the present time. So if it

(Testimony of James W. Bouton.)

is irrelevant, why, I think maybe the cost of it is irrelevant. So you may take the evidence on it if you want to.

Q. (By Mr. P. J. Gallagher): What have you to say about whether or not that type of lining through there would amount to conserving the water in the canal?

A. Well, it would have an effect. Any time you lose water through seepage, why, you are going to take that same amount of water away from the farmers down below.

Q. I am going to ask you a hypothetical question,—and it is the same question, your Honor, that we submitted to Mr. Merritt, with just a change in the names.

Mr. Bouton, assuming that the North Canal of the Owyhee Irrigation Project was built in 1934 in the manner and through the type of soil which you observed and found on your examination of the canal in 1948 and regarding which you have testified in this hearing, and assuming that in the year 1945 wet spots developed in the soil in an area immediately adjacent [355] to the lower bank of said canal to such an extent that it was difficult to cultivate or plow such spots because of the water in the soil, and that when the crops in said area were cut the water would rise in the mower or horse tracks, and that tractors could not be used in said harvesting operation because of the wet condition of the soil, and assuming that this condition existed over an area of approximately one and one-half

(Testimony of James W. Bouton.)

acres at different spots adjacent to said canal; and assuming that a water seepage developed in an area of some 200 to 250 yards south and east of a spot later to be described as a break in the canal and that such seep has increased materially to where it now runs in a perceptible stream or flow; and assuming that on July 14, 1946, the canal was carrying approximately 450 second-feet of water, and that on that date a large segment of the lower bank of said canal broke away and was washed away below the normal bottom of said canal; and further assuming that in the construction of that part of the canal where the break occurred no core wall was constructed in the lower bank of that canal—Assuming all the matters suggested to you in this question, and taking into consideration the type of soil you found in the side and bottom of the canal at the time of your examination in 1948, and regarding which you have testified, have you formed an opinion as to what caused the ditch to break in July, 1946? The question is, have you an opinion? [356]

Mr. Hess: Are you through?

Mr. P. J. Gallagher: Yes.

Mr. Hess: We renew the objection made, your Honor, to the question when propounded to Mr. Allen C. Merritt. We renew that objection.

The Court: The objection, on the same ground, is overruled.

Q. (By Mr. P. J. Gallagher): Have you an opinion, Mr. Bouton?

(Testimony of James W. Bouton.)

A. Well, my opinion would be——

Q. Well, just say Yes or No first; then you can give your opinion.

A. Just to what is your question directed; then I can answer it Yes or No.

Q. Well, the question is whether or not you have formed an opinion, based on the facts I read to you in the question? A. Yes, I have.

Q. All right, you may give your opinion as to what caused that break.

Mr. Hess: Now, if you Honor please, we renew our objections as made to the hypothetical question when propounded to Mr. Allen C. Merritt.

The Court: Same ruling: Objection overruled.

A. Thoroughly saturating that bank below through that pervious material caused the bank to give way. There was nothing there to stabilize it. Naturally, when it became thoroughly saturated [357] something had to give and the bank went out.

Mr. P. J. Gallagher: Having given your opinion as to the cause of the break, and taking into consideration all the facts that I have asked you to assume in the hypothetical question and also all the conditions you found on your examination in March, April and May, or at such times as you visited the break, in 1948, and to which you have testified, have you an opinion as to how the break which occurred in July, 1946, could have been avoided?

Mr. Hess: Now, if your Honor please, we renew our objection in the same language and manner as

(Testimony of James W. Bouton.)

was made to that hypothetical question submitted to Mr. Allen C. Merritt.

The Court: The objection as renewed is overruled.

A. Is that the first or second break?

Q. (By Mr. P. J. Gallagher): I am speaking of the first break, Mr. Bouton.

A. I thought I answered that question before.

Q. Well, you did, and you answered a series of questions that might indicate what your opinion was, but I am asking you now if you have an opinion as to how the break could have been avoided?

A. After the canal was constructed?

Q. No.

A. Or during the construction work?

Q. During the construction,—How could the canal have been [358] built so that the break could have been avoided?

A. They could have put in the same core wall that they put in there after the break occurred, if that core wall was down far enough below the pervious material, or it could have been lined.

Q. Either method, in your judgment, would have prevented the break?

A. Either would have prevented the break, I think.

Q. Now, Mr. Bouton, assuming that the core wall was not put in in the construction period, and after seepage began to be evident on the ground, could the ditch still have been repaired so as to have avoided the probability of a break?

(Testimony of James W. Bouton.)

A. Yes.

Mr. Hess: We object to that. We make the same objection to that, amounts to——

The Court: Same ruling.

A. It could have been prevented.

Q. (By Mr. P. J. Gallagher): It could have?

A. Yes.

Q. By what method? A. By lining it.

Q. The same type of lining you have described heretofore? A. Yes, sir.

Q. One other question: It is apparent, or it has been testified to, Mr. Bouton, that after the first break occurred a [359] core wall was built in the bottom of the ditch over an area or distance of between sixty and a hundred feet, and that then the bank was built up from the bottom of the ditch for a height of from four and a half to six feet, and the water was then turned into the ditch and water ran over the top of the ditch and later, at a point ten to twelve feet downstream from the end of the core wall, another break occurred. Now, taking into consideration the conditions that you found which indicated whether or not there was seepage along the bank of the canal, I will ask you if you have an opinion as to what may have caused the second break in the bank of the ditch?

Mr. Hess: We renew our objection to this hypothetical question in the same form and manner as made to the hypothetical question propounded to Allen C. Merritt.

(Testimony of James W. Bouton.)

The Court: The objection as renewed is overruled.

A. That would depend entirely on whether they built that core wall beyond any chance of seepage getting through the new embankment and the old embankment at the time—at the place where they built the core wall—or beyond where they built the core wall.

Q. (By Mr. P. J. Gallagher): Well, my question assumed as a fact that the core wall was not built at the place where the second break took place. Now, will that help you in forming an opinion?

Mr. Hess: We renew our objection, your Honor. [360]

The Court: Same ruling.

A. I think the same condition existed there that existed in the other point, that would be my opinion, and that the core wall was not carried far enough down the stream to prevent another break.

Q. (By Mr. P. J. Gallagher): In your opinion,—Or is it your opinion that if the core wall was extended far enough north to intersect and cut off all of the seepage area from the upper bank, would that have tended to prevent the second break?

Mr. Hess: We renew our objection, your Honor, in the same manner as propounded to Allen C. Merritt in the question.

The Court: I will sustain an objection to this question because I don't know what it means. If you have some other point in mind, why, you can go ahead. I don't mean to stop you from that.

(Testimony of James W. Bouton.)

Q. (By Mr. P. J. Gallagher): As I understand your testimony, the area that was susceptible of absorbing water, or the stratum that you say was pervious and is shown on the upstream side of the bank, was 200 to 250 feet long?

A. I think my statement was approximately 200 feet long.

Q. Two hundred feet long; and extended for a distance of 50 to 75 feet north of where the first break took place?

A. I think that was my answer.

Q. In your opinion, would the same saturated condition exist [361] in the bed of the ditch and in the lower soil as a result of the seep through the north bank—west bank at a point where the second break took place?

Mr. Hess: We object to that, your Honor, as incompetent, irrelevant and immaterial, the witness not having shown himself to be qualified. He states that he does not understand the geological conditions that exist there for storage,—and based upon guess and speculation.

The Court: Well, that is overruled.

A. The area north of the break, as surveyed by Mr. Bronken, shows that the seepage area did extend out some distance north of the break. Naturally, there must have been some porous material in the bank that would allow that water to seep through north of the first break, and in my opinion that would cause the second break.

Q. (By Mr. P. J. Gallagher): Now, another

(Testimony of James W. Bouton.)

line of interrogation: The record in this case shows that after the first break occurred the bank was built up on top of the core wall, oh, to a height of four and a half—between four and a half and six feet; and the record further shows that with the bank built that high water was turned into the ditch to a depth sufficient to overflow the new embankment and that continued for some hours. Would you say that that was good management and maintenance or good engineering, to have turned that much water into a fresh canal, freshly built canal, without provisions [362] for its continuing on down in the canal and to avoid running over the bank?

Mr. Hess: We object to this, your Honor, as not showing all the conditions that existed there at that time, the conditions and the water, in the way that it was maintained and dammed off above the canal.

The Court: Overruled.

A. Well, I would not consider it good maintenance to turn the water down there that would be sufficient to run water over the top of the bank at any time.

Mr. P. J. Gallagher: I think we are about through, your Honor. May I confer with counsel just a second? That will be all. You may cross-examine.

Cross-Examination

By Mr. Veeder:

Q. Would you state the difference between cut and fill, so far as the construction of canals is concerned?

(Testimony of James W. Bouton.)

A. Well, a cut could be either on a sidehill, where you only cut out part of the canal, and the fill would be on the lower side of it where you made the other bank; or a cut could be through a certain piece of ground where you cut out the entire amount and wasted the amount of material that you cut out.

Q. It would be possible to have a canal that was cut right into the face of a hill, so that all of the water was carried within natural ground in place, is that not correct? [363]

A. It could be possible, yes.

Q. Is that not a frequent practice?

A. No; a frequent practice, usually, from an economic standpoint, is to average up the cut and the fill. In other words, you cut the amount out of the bank that you want to put into the fill.

Q. But if you were seeking security in construction wouldn't you make the canal all cut?

A. I didn't quite understand that question.

Q. If you were seeking to make the canal secure, safe, isn't it the better practice to leave the dirt in place?

A. No, not if you properly construct the outside bank it isn't.

Q. But isn't it extremely expensive when you start making core bank and fill the full length of a canal? Is that not——

A. Well, that would depend entirely on the size of the canal and the——

Q. Assuming the size of canal as here?

(Testimony of James W. Bouton.)

A. Well, I wouldn't consider it necessary to make a core wall along the entire bank of a canal. There are numerous canals in the State of Idaho, and also in the State of Oregon I presume, that it was not necessary to make a core wall. They just simply put the bank in there and probably wet it and rolled it so as to make the bank so it would be stabilized.

Q. It is a matter of engineering discretion when you are [364] constructing, isn't it?

A. That is right.

Q. You view the terrain and the character of the soil and the structure through which you are going and you make your determination as an engineer as to whether you build a core bank,—

A. That is correct.

Q. —whether you build a canal through natural ground; is that not correct? It is a discretionary matter? A. Yes.

Q. You say the factors, the conditions of construction, are usually left up to the locating engineer, who observes the status of the ground through which he is proceeding and he decides whether it should be a cut in the bank?

A. Well, that is decided on the safety and also the economic conditions.

Q. Yes, the engineer must make that determination? A. That is right.

Q. He may put some core bank and some natural bank, is that not correct? A. That is right.

Q. If he decided to silt the canal, why, he might

(Testimony of James W. Bouton.)

use a different method than in another instance, isn't that correct? A. That is right.

Q. Wholly discretionary, isn't it? [365]

A. What is it?

Q. It is a discretionary function?

A. Surely.

Q. In earth canals is it not customary, is it not a common phenomena for earthen canals to leak, to seep?

A. I think all earthen canals have a certain amount of water absorbed. In other words, there are certain losses in all earth canals, a small amount of earth loss, some——

Q. Of water losses?

A. Yes, water losses. Some are greater in one canal than in others. That depends upon the porosity of the soil which the canal is running through.

Q. The presence of seepage in itself does not disclose a dangerous weakness in the canal, does it?

A. That would depend entirely on the amount of seepage that was encountered there.

Q. And the corrective measures—That is, I presume in the canals that you have managed where there was seepage you determined what corrective measures were necessary to rectify a seep area, is that not correct?

A. Yes as a rule, we measure our canals to determine where the seepage losses are.

Q. And it is a matter of discretion, then, engineering discretion, as to what method and practice you would use to correct that seepage? [366]

A. Usually.

(Testimony of James W. Bouton.)

Q. And by observation of the seep area you would determine what in your mind would be the proper discretionary act to take to rectify it?

A. I would consider that good engineering practice.

Q. The appearance of seep in a particular area on a canal is not necessarily indicative that the water causing that seep arises from an area of the canal immediately adjacent?

A. I don't know as I quite understand your question.

Q. In other words, is it not possible for the seep to proceed down the canal quite a distance before coming to the surface?

A. No; it could do it; it could do it. It would depend entirely on where the least resistance to the water was whether it would follow the canal down or whether it came out immediately.

Q. It might arise a quarter or half a mile away, though, from where the actual seep occurred?

A. Well, that is possible, but it is hardly possible in this territory here.

Q. In determining whether to line a canal in the first instance, you weigh much the same factors, do you not, as you do in determining whether you put in a core in a canal bank?

A. That would depend entirely on whether just a core in the bank on the downhill side of the hill would be sufficient or [367] whether there's other conditions there in the bottom or the uphill side, as to whether a core would be sufficient to take

(Testimony of James W. Bouton.)

care of the conditions or whether it would be necessary to line it.

Q. It is a matter of determination based on existing factors? A. Yes.

Q. And the engineer having made that decision after investigating those factors?

A. That is right.

Q. You referred to live water in a coulee north of the break. would you locate that?

A. I beg your pardon?

Q. Where was the coulee to which you referred——

A. This coulee right here, down here (indicating).

Q. That appears on Plaintiffs' Exhibit No. 70?

A. That is right.

Q. And where is that located with respect to the break?

A. Well, I don't remember the exact distance, but it is north, it is really the first coulee north of the break, as I remember it.

Q. You couldn't state in number of yards or feet from that? A. Not very definitely, no.

Q. It is some distance, though, is it not?

A. Oh, it is probably—down to the head of it I imagine would be probably a thousand feet. [368]

Q. About a thousand feet. And would you state the time in which that live water appeared?

A. Along in March, between the 1st and the 10th of March, 1948.

Q. Was there water in the canal at that time?

(Testimony of James W. Bouton.)

A. No, there was not.

Q. Did you observe any conduits under the canal near the head of that gulch?

A. No, I didn't go down to see whether there was a conduit there or not.

Q. That live water might possibly have come down from that heading?

A. No, it couldn't come down from above the canal and through that conduit.

Q. Is there not a whole area back in that back country there that is inclined towards the river?

A. That is right.

Q. And isn't it the situation that the subterranean—that the ground water proceeds toward that area?

A. I imagine, from my observation of all that growth down below the canal, with no growth above the canal, that that would be evidence that the water is coming in below the canal.

Q. Would you state the thickness of the core stratum in the upper bank of the canal?

A. I beg your pardon? [369]

Q. Would you state the thickness of the core stratum in the upper bank of the canal?

A. The thickness—Do you mean the vertical thickness or the horizontal thickness?

Q. The vertical thickness.

A. Well, we didn't dig down, excavate any material there, to find out what the thickness was below this material that was thrown down and

(Testimony of James W. Bouton.)

covered it up, but I imagine it was right in the neighborhood of about—I imagine it averaged from around six inches to three or three and a half feet deep.

Q. There is a considerable variance, in other words, in the stratum?

A. A considerable variance.

Q. In the thickness?

A. That is right. That is, so far as my observation was. As I say, we didn't excavate any there to find out just what the conditions were.

Mr. Veeder: No further questions.

Redirect Examination

By Mr. P. J. Gallagher:

Q. Mr. Bouton, counsel asked you about whether or not it would be discretionary with an engineer as to whether or not a canal should be lined. What is the purpose of lining a canal, anyhow?

A. There are two purposes. One is to protect, or, in other [370] words, to conserve, water, to carry that water on down to the delivery point to the farmers, or to the point of use, whatever it is for. The other is a safety measure, taking into consideration that there is a hazardous condition in the canal that might be washed out. We line it to take care of that hazardous condition.

Q. And when you say, or answered on cross examination, that that might be discretionary, did you take into consideration the purpose of lining

(Testimony of James W. Bouton.)

on the element of safety? In other words, did you mean to say that an engineer could use his discretion whether he would build a safe canal or an unsafe canal?

A. Well, that would depend on whether an engineer is competent to use discretion, too.

Q. I see. And the necessity or feasibility of lining, any type of lining, would depend somewhat on the strata that you are building your ditch through? A. That is right.

Q. Some strata would call for greater care as a matter of safety than other strata?

A. Exactly.

Mr. P. J. Gallagher: I think that is all.

Recross-Examination

By Mr. Veeder:

Q. Do you think that good engineering requires that you [371] employ a construction method that insures against all possible canal breaks?

A. I don't quite get your question.

Mr. Veeder: Would you read the question, please.

The Court: Read it.

(Pending question read.)

A. It should be done. It is not always done, but it should be.

Mr. Veeder: We have no further questions.

(Witness excused.)

Mr. P. J. Gallagher: Your Honor, I think we are about through. If we could have about a five-minute recess we could determine it, with your Honor's permission.

The Court: You mean all through with your testimony?

Mr. P. J. Gallagher: Yes, all through with the witnesses. We have another witness and we are just conferring now as to whether or not we are going to use him at all.

The Court: I will give you a recess, then. Court is in recess.

(Short recess.)

Mr. P. J. Gallagher: Could we call another short witness? Call Mr. Bronken. [372]

PAUL BRONKEN

was thereupon recalled as a witness in behalf of the plaintiffs herein and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. P. J. Gallagher:

Q. Mr. Bronken, when you were on the stand the other day you gave us some statements as to your training and qualification as an engineer. I wish, for the purpose of the questions we are about to ask you, you would state what training you have had, from a geological standpoint.

A. From a geological standpoint, I have my Master of Science degree in Geology from the Mon-

(Testimony of Paul Bronken.)

tana School of Mines, and that is a four-year course in which the prominent subjects you study are geological subjects and those pertaining to the earth's surface.

Q. And in the course of your studies did you have any field work? A. Yes, sir.

Q. And since you have been out of school have you done any field work pertaining to geological formations? A. Yes, sir.

Q. Now, how much work did you do on the investigation that you and your associates have carried on on the Owyhee ditch break?

A. The first work we did, we ran levels and made a profile [373] of the canal from the bench mark at the south end of the concrete section up through and past the break. That was done with a level—or, before we did that we actually chained down the center of the canal from Mile Post 36 to establish our station so we could construct a profile; then we ran levels on that outcropping of this pervious formation from the west side of the canal over the top of the east side of the canal and down to the wash, took samples of this same outcropping, and surveyed to establish the extent of the area that was hindered—the cultivation—I mean the vegetation was hindered to the east of the canal.

Q. That is what is shown on Exhibit 82?

A. Eighty-two.

Q. Now, Paul, did you take some samples of the stratum that has been described here as being

(Testimony of Paul Bronken.)

a pervious stratum at different places in your investigation? A. Yes, sir.

Q. At what places did you take samples of that earth? A. Shall I illustrate on the pictures?

Q. Well, just tell us.

A. I took samples of this pervious formation where it crops out from the west bank of the canal, and then down where it crops out at the head of the washout.

Q. And that would be where it shows up in Exhibit No. 73? A. Yes, sir. [374]

Q. And the outcropping where it shows up in Exhibit No. 82—or 79?

A. Eighty-two and 69 in the picture.

Q. What would you call the formation that makes that stratum, what type of rock or earth or sand?

A. I would call it, in geological terms, as fine-grained, uniform grain, sandstone, that has been partly cemented with the calcareous cement, or due from precipitation of ground waters and percolating waters, after which sand has been lain down.

Q. Did you carry on any experiments to see whether or not that was pervious or absorbent of water?

A. The experiments we carried on was the actual immersion of the rocks under water to determine the extent of the porosity of the sandstone.

Q. Do you have some of those samples with you at the present time? A. Yes, sir.

Q. Would it be much trouble to carry out a little experiment in the courtroom here to show how water affects that sandstone formation?

(Testimony of Paul Bronken.)

Mr. P. J. Gallagher: Could we do that?

The Court: Well, I understand at the present time that this matter should have been taken up in the pre-trial order if you were going to do anything like that, so these people [375] would be on notice. If they want to consent to amend the pre-trial order I will let you do it.

Mr. Hess: Well, if your Honor please, we feel that they had plenty of chance to do this with these witnesses, and we don't know the purpose of this, or anything else.

Mr. P. J. Gallagher: All right, I will withdraw that.

The Court: The rule is that with the pre-trial order your exhibits should be displayed, and you should have brought that up if you were going to do it at the trial, and this is production of factual exhibits.

Q. (By Mr. P. J. Gallagher): What is the nature of the experiments that are necessary to determine the porosity of the soil?

A. Well, a true laboratory determination of the porosity of soil would be on weight measure, where you weigh your sample—dry it first, get it completely dry, and weigh it; then pour water on it or put it under water and weigh it afterwards to determine the amount of water it will absorb. That would be the laboratory method. Or from the standpoint of determining whether a rock will absorb water, you can immerse it in water, and all air that is entrained in the water will bubble out, and

(Testimony of Paul Bronken.)

you can see that bubbling of air coming out of the rock that——

Q. What was the method that you employed?

A. We employed the method of putting the sample in water and showing the air bubbles coming out of the rock. [376]

Q. Did the experiments show it to be porous or otherwise?

A. I would say it showed it to be porous.

Q. And do you have any way of measuring this porosity?

A. No exact measurements could be made on that unless you had some very highfalutin apparatus to catch the amount of air that came out of the rock.

Q. How long did your experiment give evidence that the water was displacing air in the rock and the air was bubbling out?

A. A considerable amount.

Q. What would that indicate as to the degree of porosity in the rock?

A. Well, that would indicate to me that it was rather high.

Q. What have you to say, then, as to that type of rock, where it is subjected to a sufficient amount of water, as to its softening and sloughing-off?

A. Well, as your water absorbs or dissipates within the rock it will have a tendency to dissolve the bonding material that holds the sand particles together, and if and when that is dissolved you have nothing but a bunch of sand that has been held to-

(Testimony of Paul Bronken.)

gether by any physical means other than the boundaries of the other earth around the sides.

Q. Paul, did you make enough examination of the stratum to be able to tell the Court how much of that stratum that is shown on Exhibit No. 80, the one that runs down from the ditch there, how much of that stratum is composed of that [377] type of material? A. In vertical distance?

Q. That is right, vertical distance?

A. In the canal I would estimate somewhere around from two to four feet in various places is exposed that has that characteristic, and down in the wash it varies somewhat. In the wash there are calcareous bedding planes. Sometimes the water has gone through there, the wash of the water has gone through there, and below those planes there might be some, but on top of there I would say there would be about two, two and a half to three feet of material exposed.

Q. Did your experiments indicate the capillary capacity of the rock or inclination?

A. Yes, sir.

Q. What have you to say as to whether or not there was capillary action evident?

A. I would say there was capillary action evident, or there is now.

Q. And is that in marked degree, or just——

A. I would say it is in a marked degree.

Q. Are you prepared to give any opinion at all on whether or not that stratum that is exposed in the mountain side of the canal would absorb

(Testimony of Paul Bronken.)

water during the irrigation season that might find its way into subterraneous channels and get out under the canal? [378] A. Yes, sir.

Q. What is your opinion about that, Paul?

A. My opinion is that when the water enters this pervious formation as shown on Exhibit 80 it is on an incline toward the valley. In other words, as water enters there you are going to get a hydrostatic head that will keep pushing the water through the formation, and since you have a source of water there is no reason to believe that in time it won't completely fill until it crops out someplace and comes out on the surface.

Q. In other words, it would follow on down this pervious structure until it found an outcropping where it could get out?

A. Yes, until it found some weakness where it could free itself.

Q. Did you find in that vicinity any spots where the water is coming up at the present time?

A. Yes, sir. The most prominent one is to the south of the break, in a neighboring field there. We observed a flow of water there coming out of the middle of the field. I would imagine it is about, oh, somewhere between a hundred and a hundred and twenty-five feet down the slope from the toe of the canal bank. It just bubbles right out of the ground there.

Q. In your experiments, Paul, did you leave this sandstone in the water to determine how long it had to remain there before it dissolved?

(Testimony of Paul Bronken.)

A. Until it is dissolved, I would——

Q. Until it lost its formation?

A. Until it lost its formation. Yes, we left this sandstone in the water, and right now—We put it in about a month ago, and right now about half of it has been dispersed and is just laying in the bottom of our container as loose sand.

Mr. P. J. Gallagher: That is all.

Mr. Veeder: There are no questions.

(Witness excused.)

Mr. P. J. Gallagher: If the Court please, on the issue that we are now trying, as we understand, we are not to put forward any testimony as to the particular damages, but, limiting the testimony as to what we consider to be the testimony of negligence, that would be all of our testimony, with one exception. I have asked the Government to furnish us with a statement with the respective amounts of land that was Government land and that that was in private ownership at the time the project was built. They tell me they can do that and get it in the form of a document that they can introduce later.

The Court: Is that true? Do you agree to that?

Mr. Hess: Just a minute, your Honor. Is there any [380] reservation in the pre-trial order as to exhibits of anything of that nature?

Mr. P. J. Gallagher: No. That becomes material upon the basis that you set up in your motion to dismiss. For the first time that question was raised,

as to the purpose of building the project, and I think would be material in our argument as against a motion to dismiss to be able to show to the Court the number of acres that were in private ownership as compared to the number of acres that was Government land at that time.

Mr. Hess: Well, if your Honor please, we just don't know what the purpose of this is, and we do not desire them to hold their case open for some further testimony of any kind. We would like to see them close.

Mr. P. J. Gallagher: Well, I think right here in the courtroom we have a number of witnesses that can tell within five acres how much was in private ownership and how much was in Government ownership.

Mr. Hess: Do you want to put on a witness? We have no objection.

Mr. P. J. Gallagher: Well, we would have to call one of your men.

Mr. Hess: Well, we have no objection. Go ahead and call him.

Mr. P. J. Gallagher: Mr. Newell will know. [381]

Mr. Hess: Go ahead and talk with our witness back there.

The Court: Well, we will take a recess and let you interview him.

(Short recess.)

Mr. P. J. Gallagher: If the Court please, at this time counsel for the defendant and counsel for the plaintiffs have agreed upon the question in-

volved as to the acreage in the project and it is agreed that we may stipulate into the record the following statement:

That in the entire project the total acreage is 101,000 acres, and that of such 101,000 acres there is 16,000 acres of public lands and a total of 65,000 acres of new lands. The acreage of new lands will be inclusive of the public lands. Then there are other lands which have been served by supplemental contracts and that they are now selling water to totaling some 13,000 acres. The project as designed was to include 101,000 acres total, and of that 101,000 acres 16,000 is public lands and the balance in private ownership.

Mr. Hess: May I look at that a moment, Counsel?

Mr. P. J. Gallagher: Counsel has called my attention to the exact difference between the old lands and the new lands. That will be shown by the difference between 65,000 and 101,000, or 36,000 acres of old lands in the project, old cultivated lands. [382]

Now, your Honor, going back to my former statement, assuming that we are now trying only the question of negligence, or the duty of the Government to furnish water, that will be all the testimony that we care to offer at this time on that branch of the case.

The Court: The Court will direct—You don't need to do it now—The Court will direct that this stipulation be added to the pre-trial order as part of the agreed facts.

Mr. P. J. Gallagher: Thanks, your Honor.

The Court: Plaintiffs rest.

Mr. Veeder: The Court has before it now a motion to dismiss on the failure-to-deliver-water cases, on the ground that there is no duty owing by the United States to the plaintiffs to provide them with water, and it is our understanding that motion is still being considered by the Court. We wish to make a separate and additional motion, distinct and separate from the one presently before the Court, that upon the grounds of the facts produced by the plaintiffs they have disclosed that the negligence, if any, arose from discretionary acts on the part of the Federal employees who constructed this project, and the North Canal in particular, and therefore exemption from immunity, the waiver of immunity, does not apply, by reason of the fact that 28 U.S.C.A. 943(a) of the Federal Tort Claims Act provides that the provisions of the chapter shall not apply to any claim based upon an act or [383] omission of an employee of the Government based upon exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not that discretion involved be abused.

We wish likewise to add to that ground the fact that if some of the acts are found to be discretionary and some are not discretionary, under the rule that when damages may have resulted from one of several causes and that it is as probable that it may have been from one cause, for which defendant was

not responsible, as from one for which it was, the plaintiff likewise has failed to make out a case.

On those two separate grounds we move for dismissal, under Rule 41(b) of the Federal Rules of Civil Procedure.

The Court: I think that that clause of the Act has no application to this case. The performance of a discretionary act or the failure to perform a discretionary act applies in an entirely different situation. Where the Government were appealed to to do some act or perform some work which was discretionary within the statutory powers of a Government employee, then if he exercised his discretion and failed to perform the act of course there would be no liability under this section, and I think that is only a statement of the ordinary law on the subject.

Now, you have gone to a good deal of trouble to [384] prove that this act was discretionary, but the way you use that term is in an entirely different sense than the way the term is used in the Act. You are using it to cover a professional choice. The engineer is professional, and, when he exercises his discretion, in order to avoid liability in private affairs and concerns he must exercise his discretion according to the rules of his profession, of a sound professional practice. If he fails to do that under an appropriate situation, then he can be held to be negligent for that failure and under certain circumstances can be held liable for damages.

The proof in this case has indicated, from plaintiffs' witnesses, at any rate, that it was not sound

professional practice to build a canal over a porous structure of this sort without either lining or building a core wall of sufficient depth to prevent the seepage of moisture. By that is set up, according to that testimony at least, the professional standard, and the other proof has tended to show that there was a breach of professional duty by a failure to exercise the standards which would be common in engineers in this type of project.

I think I can illustrate the difference between the two senses in which the word is being used by taking the example of a doctor. A doctor is going along the road and he finds somebody lying there injured. He has discretion as [385] to whether he will treat the person or not. If he does not assume to treat the person there is no liability, it doesn't make any difference what he could have done for him, because he owes no duty to the person whatsoever, and therefore that is a discretionary field. On the other hand, if he assumes to treat the person, he still has discretion as to the means which he will employ, but if he fails to employ the skill which is common to the reasonable practitioner of medicine in that particular locality then he is liable, and I think that those are the principles that are here applicable.

These motions are overruled. The main motion for dismissal is still continued under advisement.

Mr. Lytle: If the Court please, may I approach counsel at the table a moment?

Mr. Hess: Call Mr. R. J. Newell.

R. J. NEWELL

was thereupon produced as a witness for the defendant herein and, having been first duly sworn, was examined and testified as follows:

The Clerk: R. J. Newell.

Direct Examination

By Mr. Hess:

Q. Where do you reside, Mr. Newell?

A. Boise, Idaho.

Q. How long have you resided there?

A. I took up residence there about forty-five years ago. I have been in and out of town several times for short periods.

Q. In connection with your official duties?

A. That is right.

Q. What is your age, Mr. Newell?

A. Sixty-eight.

Q. Will you just state to the Court your educational background, generally?

A. I completed a standard engineering course in Highland Park College of Des Moines, Iowa, and took a Bachelor's degree in 1903 and a Master's degree in 1910.

Q. Where did you take your Bachelor's degree?

A. In Highland Park College.

Q. And your Master's degree? [387]

A. The same school.

Q. And how long have you been a practicing civil engineer?

A. For forty-five years, with a lapse of five

(Testimony of R. J. Newell.)

years in which I did only occasional engineering work.

Q. Are you a member of any professional society of engineers? A. Yes, sir.

Q. Will you state that, please?

A. The American Society of Civil Engineers and the Idaho Society of Professional Engineers.

Q. Have you ever written any technical treatises or articles with respect to problems of civil engineering?

A. I have written articles on dam construction for engineering magazines and prepared technical reports on reclamation projects.

Q. Would you give the names of some of those articles you wrote, if you can recall them, and where they were published?

A. One article, on the construction of the Cle Elum Dam, was published in *The Engineering News Record* and *The Military Engineer*.

Q. When?

A. About 1933. Another, on the construction of the Deadwood Dam, was published in *The Engineering News Record* a little earlier.

Q. And what is the official position you now occupy?

A. Regional Director of the Bureau of Reclamation for Region I. [388]

Q. And of what is that Region comprised?

A. The area drained by the Columbia River and coastal streams in the neighborhood—practically Washington, most of Idaho, the Western slope of

(Testimony of R. J. Newell.)

Montana, and parts of Wyoming, Utah and Nevada.

Q. And how long have you occupied that position as Regional Director of the Bureau of Reclamation for Region I?

A. I was Assistant Regional Director from 1943 until 1945, and Regional Director since 1945.

Q. And what do the duties of that job entail, that is, the general duties?

A. The supervision of all the activities of the Bureau of Reclamation in the Region.

Q. Would you name some of the major projects within that Region?

A. There are three long-time operating projects, the Yakima, the Boise, and the Minidoka; the Owyhee Project, more recently built; and under construction now the Columbia Basin, the Hungry Horse, and a number of other projects.

Q. Your Region includes, as you have stated, takes in such projects as Bonneville and Grand Coulee?

A. Not Bonneville.

Q. Not Bonneville.

A. But Grand Coulee is included.

Q. I see. And all of those projects within this Region, as [389] you state, are under your immediate supervision, is that correct?

A. That is right.

Q. How long have you been connected with what is known as the Owyhee Reclamation Project, of which this North Canal is a part?

A. I was employed on investigations from about

(Testimony of R. J. Newell.)

1923 to 1926, and assumed charge of construction and operation in 1933, to date.

Q. State whether or not you prepared the reports upon which the findings of feasibility for this project were entered—were made, rather.

A. The report was a joint report by Mr. Bond and myself.

Q. Would you tell us who Mr. Bond is, or was?

A. He was the Superintendent of the Boise Project for the Bureau of Reclamation at that time.

Q. Is he now living? A. Yes.

Q. Where does he reside?

A. Between San Diego and Los Angeles, a little Coast town that I have forgotten the name of now.

Q. Is he retired? A. Yes.

Q. Would you describe the extent of the investigation that was made on the Owyhee Project prior to construction? [390]

A. The investigations had been carried on over a number of years and included studies of water supply and land and engineering works necessary to conduct the water to the land. The study of the land would include determination of all the land that could be covered and then a determination of the part of this land, on account of the soil and topography, that was suitable for irrigation; and then a further determination as to the ability of farmers on that land to repay costs of the project; then the plans and estimates of cost for the engineering works necessary.

(Testimony of R. J. Newell.)

Q. What was the cost, the general cost, of the Project, the over-all cost?

A. Between eighteen and nineteen million dollars.

Q. Who prepared the plans and specifications for the construction of the North Canal?

A. They were drafted in the Project office and reviewed and issued in the Chief Engineer's office at Denver.

Q. Would you give a description of this Owyhee Project generally, that is, the irrigable acres and what it entails?

A. It is located in a long strip along the west side of the Snake River, extending fifty or sixty miles, part of the land being in Idaho and part in Oregon.

Q. How many acres of irrigable lands did that include?

A. About 101,000, not including the Owyhee Ditch lands, which have some supplemental water from the Project. [391]

Q. Could you give an estimate of the number of families that are situated on this Project area?

A. There are about 1500, also not counting the Owyhee Ditch Company's lands.

Q. Are all of them served by the Project?

A. That is right.

Q. What is the yearly cost, the estimated yearly cost, of operation and maintenance on this North Canal, that is, the North Canal only, that part of the Project?

A. It is in the neighborhood of \$200,000. It is

(Testimony of R. J. Newell.)

difficult to differentiate closely between the North Canal and the South Canal, which are operated by the same forces.

Q. But for the North Canal you estimate that it is approximately \$200,000, is that correct?

A. Right.

Q. Would you describe this area of 101,000 acres that you have mentioned as it existed prior to the time the Owyhee Project was constructed?

A. About one-third was and had been irrigated by pumping from the Snake River for a number of years, and about two-thirds was new land, in sagebrush.

Q. Just state, taking the area generally from the break upstream and downstream, from that angle, where was most of the pumping, the majority of the pumping? Did you understand that question? [392]

A. There was more pump land upstream than downstream, if you include the Idaho area, which had the largest single pumping district.

Q. Was this approximately 65 per cent of which you speak occupied prior to the construction of the canal?

A. No.

Q. Well, what was the nature of that land?

A. It was sagebrush land that grew no crops—a little grazing. There were a few weeds and onions in the spring and in the fall that stockmen grazed off.

Q. How many families would you estimate came into the area of what you have described, this Owy-

(Testimony of R. J. Newell.)

hee Project area, as a result of this construction?

A. About one thousand on the land directly.

Q. Are these families now making a success of their farming operations?

A. Practically all of them.

Q. And since the construction of the canal, the North Canal, and the time in which the first waters were turned down the canal? A. Yes.

Q. Will you describe the situation that prevailed on the area which was served by the pumping from the Snake River prior to the time the system was constructed?

A. Most of the pumping districts had been paying for pumping [393] power at commercial rates and were in extreme financial difficulties.

Q. Was that on account of the pumping liabilities, that is, the costs, and so forth?

A. That was on account of the cost of operation and maintenance, yes, sir.

Q. Well, what effect did the construction of the Project have upon that situation?

A. The cost of power was very much reduced and was also spread over the pump lands and the new lands also, so that the annual cost was much less than it had been.

Q. That is, the annual cost per acre?

A. That is right.

Q. And that was such, as I understand your testimony, as to bring into a high state of production some 65,000 acres of land that had theretofore been barren sagebrush land?

(Testimony of R. J. Newell.)

A. That is right, 65,000 acres were added agricultural lands.

Q. What was your experience in the location and construction of canals prior to the time you built this North Canal?

A. I started working on location and construction of canals in 1906 and have been employed part of the time ever since. The Boise Project canals were under my supervision from 1926 to 1931, and beginning with 1933 the Boise canals and the Owyhee, in both construction and operation, have been directed by me. [394]

Q. You have directed their construction, is that it? A. That is right.

Q. How does the New York Canal, that is, this main Boise canal, compare in size and capacity with the North Canal?

A. The capacity of the New York Canal is about 2800 second-feet. The North Canal on the Owyhee Project at the head is about 1100, I believe, and at the site of the break about 450.

Mr. P. J. Gallagher: May I ask the witness to give me those figures again?

The Court: Well, it is available for you here in the record. Go ahead.

Q. (By Mr. Hess): What other experiences have you had in locating and constructing and operating of canals other than stated by you?

A. I have reviewed actual construction and operating experience direct, but in the past five years

(Testimony of R. J. Newell.)

we have been in general charge of all the canal work in the Northwest region.

Q. Who located the canals on what is known as the Vale Project?

A. I made the location of the canals on the Vale Project.

Q. I am not certain whether you covered this or not, but since 1933 have you been in charge of the locating and construction and operation of the canals on the Owyhee Project and the Payette Division of the Boise Project?

A. When I came to the Owyhee Project in 1933 there was about [395] five miles at the head constructed. I have been in charge of all the plans on both the Owyhee and the Payette Division of the Boise Project.

Q. And, of course, that included all of this section of the North Canal on which this break occurred?

A. That is right.

Q. Were you employed by the Bureau of Reclamation at the time the project was approved by Congress, that is, the Owyhee Project?

A. Yes.

Q. What are the steps in gaining and securing the approval of this Project—what were those steps?

A. It was necessary to have a finding of feasibility by the Secretary of the Interior, and then, of course, appropriation of funds by the Congress.

Q. And that was made up, was it not, based upon the reports that had been submitted—the reports,

(Testimony of R. J. Newell.)

investigation and reports? A. That is right.

Q. And you and the now retired gentleman, Mr. Bond, were the men that prepared those reports upon which the findings of feasibility were prepared, is that correct? A. That is right.

Q. Was the findings of feasibility a condition to the construction of the project? [396]

A. It is.

Q. In determining whether or not the project was feasible, what were the chief factors that were taken into consideration?

A. The amount and quality of the land, the sufficiency of the water supply, and the cost of the works required.

Q. And the cost of the North Canal was one of those important factors taken into consideration in the building of this project, was it?

A. It was.

Q. Would you just describe for the Court the major structures of the Owyhee Reclamation Project?

A. There is included the storage dam and reservoir, the main No. 1 outlet tunnel, and from the end of that No. 1 tunnel, the South Canal system extending southerly, and the North Canal and its structures and branches extending north.

Q. What was your responsibility with respect to the construction of the North Canal?

A. I was in direct charge of all the construction on the Project, except work that had been done

(Testimony of R. J. Newell.)

before I came, including the storage dam and two main tunnels and about five miles of canal.

Q. And, of course, you were in direct charge of that portion which includes the area in which the breaks occurred in which these suits are involved?

A. I was.

Q. Would you describe generally why the course of the canal as it is now situated was selected?

A. It was necessary to carry the canal at a determined elevation in order to serve the lands of the Project.

Q. Did you have any other course or strata or type of material over which the canal could have been constructed other than where it was constructed, any other discretion in that matter?

A. No, the location of the canal was practically fixed by the requirements of the land and of the storage and diversion works at the head.

Q. What were the methods and practices which were used in constructing the canal, that is, this North Canal?

A. In construction—I should start with location, I think, in that it was the general practice and standards of the Reclamation Bureau that so far as possible the water section should be located in original ground. Where the topography required that there should be some fill in the outside bank below the water line that was built in advance of the main excavation of selected materials and compacted. The brush, organic material, waste of any kind, was removed from the line of the canal, the

(Testimony of R. J. Newell.)

surface on which embankment was built, and then that surface was scored in parallel furrows about—or specified 8 inches deep and 3 feet apart, in order to get bond between the filled material and the original ground. [398]

Q. Was that standard and customary method of canal construction? A. It was.

Q. And state whether or not that was the best engineering practice or not.

Mr. P. J. Gallagher: I think it ought to be shown whether or not that is his opinion that that is the best engineering practice.

Mr. Hess: That is what I am asking for, his opinion.

The Court: Not only that, but you told him what opinion you wanted him to state.

Mr. Hess: Well, I will just ask this question, whether or not that standard practice as required by the Bureau of Reclamation, whether or not that was good and approved engineering practice in the construction of canals?

A. That was the standard practice of the Bureau of Reclamation at that time.

Q. Well, the question was, was it good, was it first-class construction practice, as——

Mr. P. J. Gallagher: Just a moment. I think this last question is improper, because he says it is the best engineering practice so far as the Reclamation Bureau is concerned.

The Court: Well, I think I will let him answer it. This examination is leading, but that doesn't

(Testimony of R. J. Newell.)

have much effect on my mind, I will tell you [399] that.

Q. (By Mr. Hess): Would you answer the question, Mr. Newell?

A. In my opinion, it is good engineering practice.

Q. Well, now, in the construction of this North Canal, state whether or not that standard method of the Bureau of Reclamation was complied with in the construction of the canal? A. It was.

Q. A contract was entered into for the actual construction of the canal, was it not, by the Bureau of Reclamation? A. It was.

Q. And who had that contract?

A. J. A. Terteling & Sons, for that particular section of the North Canal.

Q. That is, where the break occurred?

A. That is right.

Q. State whether or not they engineered the canal or whether or not the Bureau furnished its own engineers.

A. The Bureau furnished all engineering and inspection service.

Q. And who accepted and approved the work that was done under the Terteling contract?

A. There was a construction engineer directly employed on that canal.

Q. And who was that engineer?

A. O. G. Boden, and he——

Mr. P. J. Gallagher: That name again, please?

A. O. G. Boden.

Mr. P. J. Gallagher: Yes.

(Testimony of R. J. Newell.)

A. He accepted the canal and usually I went over it with him before the final estimate was approved.

Q. (By Mr. Hess): State whether he worked along with the construction contractors during the time of the construction, that is, at all times during their construction?

A. He and his surveyors and inspectors were on the canal at all times it was under construction.

Q. What was the capacity at which this canal was constructed at Mile Post 36 and in that vicinity?

A. About 450 second-feet.

Q. Was there any leeway permitted for the purpose of safety in the carrying capacity of the canal?

A. The outside bank was built to a minimum of three feet above the designed water surface, and usually the freeboard was considerably more than that three feet.

Q. How much more water than 450 second-feet in this vicinity do you think the canal could safely carry, that is, under ordinary conditions—as constructed?

A. With the designed minimum freeboard we usually estimate that a canal can be increased to 10 per cent above its designed capacity. That would not overtop, by any means, however.

Q. When was water first turned down this North Canal to irrigate the lands which it served, that is, the approximate [401] time of the year?

A. It was late in 1935.

(Testimony of R. J. Newell.)

Q. And has the water been used in the canal for irrigation at all times since that time?

A. It has been used throughout the irrigation season ever since, except for this break and one previous break.

Q. Where was the previous break?

A. Oh, it was about thirty miles up the canal from the last break.

Q. Had there ever been any break of this canal from a point approximately 30 miles upstream from this break to and including its entire length downstream at any time since it has been serving this area, other than the break or breaks in question in this litigation?

A. Yes, sir, there was one minor break in so-called East Cow Hollow some time in the intervening period. I am not sure of the date.

Q. How long did that prevent people from receiving water downstream?

A. It is my recollection that the water was turned out on that occasion not more than two or three days.

Q. How far is Cow Hollow from this Mile Post 36?

A. I guess about 10 miles upstream.

Q. Would you describe the structure of this North Canal at the point of the break, that is, the construction? [402]

A. The location of the canal at the point of the break was along the lower part of the sidehill. It was at a point where a small part of the outside bank

(Testimony of R. J. Newell.)

was in fill and required a core bank, and it was located rather deep in the sidehill, so that the outside bank was very heavy.

Q. State whether or not you would call this a cut or a fill, generally, where this break occurred.

A. The greater part of the section was in cut. Part of the outside of the bank within the minimum section was in fill, a rather small part. I am speaking now from the record and not from my personal observation.

Q. Who is personally qualified to testify as to the exact construction therefrom his own personal knowledge? A. Mr. Boden.

Q. State whether or not this earth section there was located on sloping ground and whether or not it was built according to the standard of the Bureau of Reclamation.

A. It was, along the lower part of the sidehill, and, to the best of my knowledge, it was built according to our regular practice.

Q. Now, your regular practice, state whether or not in putting in a core fill, as you state,—that is, what class of material was used and how it was used.

Mr. P. J. Gallagher: Now, this is objected to, unless he knows what was used in there. [403]

Mr. Hess: I am just asking him as to his standard, your Honor. He is talking about the standards of core banks. I am asking him what it was.

The Court: Well, unless he testifies there was a core bank here I am not interested in it.

(Testimony of R. J. Newell.)

Q. (By Mr. Hess): Would you describe the purpose of a core bank?

A. As previously stated, it was the practice to locate a canal so that the water section was in original ground. Where topography made that impossible the minimum section of the outside of the bank was built of selected materials and compacted; then the balance of the excavation was just thrown over, without any stratification or compaction.

Q. In your opinion, state whether or not that is good engineering practice in canal construction.

A. Yes, sir, that is the practice we are following everywhere I know of canal construction being carried on by the Bureau now.

Q. How are core banks constructed and bonded to native materials?

A. The brush and trash and organic matter is cleaned off the base of the fill, to begin with, and then selected materials are hauled in with cats and scrapers and compacted by the travel of the Caterpillars.

Q. There has been testimony introduced in this case to the effect that there was no evidence in the first break that a core wall or a core trench had been used in original construction. Is what is designated as a core bank the same as a core wall?

A. No; a core bank, as we use the term, is a minimum section of bank in fill, which to support—to cut off the water must be of selected materials and compacted. It is not the practice to cut a trench

(Testimony of R. J. Newell.)

in the foundation beyond those scoring furrows that are required.

Q. Do you regard it as sound engineering practice to use a core bank rather than a core wall?

The Court: Now, just a moment. Before you go into this proposition I want to know that there was a core bank there.

Mr. Hess: The evidence will so show, your Honor. We will follow it up with other evidence.

The Court: That is what I want to know. I want to know whether there was a core bank there before I go into hypothetical questions based upon the theory that there is one there.

Mr. Hess: Of course, we can put this witness back on after I call Mr. Boden.

The Court: I don't care anything about that. I am just telling you now that there is no basis for that hypothetical question.

Q. (By Mr. Hess): It is observed that certain areas of the [405] canal are lined with concrete, whereas other segments of the canal are not. Would you explain the reason for that type of construction?

A. Where the canal line was located high on a steep sidehill so that a break would be especially dangerous, and where the appearance of the formation was unfavorable, concrete lining was resorted to.

Q. Did you participate in the engineering decisions as to whether or not the whole canal should be lined? A. I did.

Q. Please tell the Court what factors entered

(Testimony of R. J. Newell.)

into the judgment and decision not to line the whole canal?

A. The cost was the principal factor, and the doubt of the necessity was a further reason. It would be agreed that a concrete-lined canal would be somewhat safer than one without concrete lining, but the record of this canal, it seems to me, bears out that concrete lining for the whole length was not necessary.

Q. Well, the factor of cost, would that have some relation, from one section of a canal and people irrigating on that, as in comparison with other people on another portion of the canal, and, if so, would you describe what there is?

A. Certainly. If it had been decided to line the North Canal with concrete for additional safety it would have been necessary to line the South Canal of the same project to secure [406] equal safety in that part of the project.

Q. Well, would such expensive measures have removed the risk entirely, the risk of the breaking of the canal?

A. No; concrete lining of a canal does not provide complete safety.

Q. Well, what would the relative cost be per acre for people who irrigated their lands?

Mr. P. J. Gallagher: I don't think that the witness has shown that there was any computation made, your Honor. Objected to as immaterial, anyway.

The Court: Well, I think he is competent to say.

(Testimony of R. J. Newell.)

He made a recommendation as to the feasibility, so I don't think there is any doubt about his competency to speak upon the question.

A. At the prices that were then in force,—and this project was built when construction costs were very low—it is estimated that the cost per acre would have been increased forty or forty-five dollars if all the North and South Canals had been lined——

Q. (By Mr. Hess): Dollars per acre? Forty-five dollars per acre?

A. That is right,—and it is assumed in that estimate that the canal would have been smaller if concrete-lined, and credit has been taken for less excavation in arriving at that figure. [407]

Q. State whether or not you would regard the decision not to line the canal as a sound one from a standpoint of good engineering? A. I do.

Q. Are you familiar with the various methods of lining that might have been used?

A. Yes. Other methods of lining are being studied and practiced to some extent all the time.

Q. What other methods, generally, are being used, studied and used?

A. The most common method is earth-blanketing of selected earth and gravel rolled into place after the canal has been excavated.

Q. Well, is that inside or outside the banks of the canal? A. Inside.

Q. Would you indicate to the Court what the cost of those measures would be per acre, approximately?

(Testimony of R. J. Newell.)

A. I am not prepared today to make an estimate of cost of earth-blanketing all the North and South Canals.

Q. Would you state why, at the particular point where the canal break occurred, concrete lining was not used?

A. Because the line was located near the foot of a sidehill, the supporting ground below the line being a gentle slope and nothing on the surface indicated a particular hazard at that point. [408]

Q. Would you explain what you mean by the slope, the outside of the canal, being gentle,—what do you mean by that?

A. Well, there was no steep sidehill below the canal.

Q. Could you drive a car down it?

A. Oh, yes.

Q. Are you acquainted with practices of location and construction of canals in this area other than that under your direction?

A. I am more or less familiar with all canals in this general area.

Q. In your opinion, state whether or not it would be good engineering practice to line the inner bank of that North Canal and in the region where this break occurred,—that is, the upper bank, the uphill bank.

A. I think that it very rarely is of advantage to line the upper bank of a canal.

Q. Now give your reasons.

(Testimony of R. J. Newell.)

A. A certain amount of water seeps into the hillside above the canal, and, if the canal is not lined, as soon as the irrigation season is over it seeps out again. If there is lining there to prevent it from seeping out, it would either soften up and slough down an earth lining or in the wintertime heave and break up concrete lining.

Q. State whether or not it was the practice in the construction of this canal for the treatment of porous areas when [409] these were found in the course of excavation?

A. In areas—any areas that unsuitable material was uncovered in the excavation were overdug and replaced by selected material.

The Court: Well, was that done at this particular spot? A. I can't testify as to that.

Q. (By Mr. Hess): Now, then, referring back to this Terteling contract, Defendant's Exhibit No. 63, was there any complaint on the part of the engineers to the effect that that canal was not being constructed in accordance with plans and specifications?

Mr. P. J. Gallagher: Just a moment. That is objected to as incompetent, irrelevant and immaterial, and the witness has not shown that he knows whether or not there would be any complaint, and that would not be the best evidence.

Mr. Hess: Well, he would know. He was generally in charge of the entire project.

The Court: Well, I don't think that he necessarily knows, but how can that be material?

(Testimony of R. J. Newell.)

Mr. Hess: Well, to show that it was constructed according to plan.

The Court: I don't know that that was constructed according to plan, if there was no complaint.

Q. (By Mr. Hess): Well, I will ask that question, whether or not this canal was constructed according to the plans and [410] specifications of the Terteling contract?

Mr. P. J. Gallagher: The same objection.

The Court: Well, if he knows he may answer.

Mr. P. J. Gallagher: Yes.

Q. (By Mr. Hess): If you know whether it was?

A. I have been over the canal from end to end, and to the best of my knowledge it was built according to the plans and specifications.

Mr. Lytle: Move to strike the answer as not responsive and not referring to the particular section in question.

The Court: No, I think it is all right. I can make up my mind as to how much he knows about it from that answer.

Q. (By Mr. Hess): In this contract was there any price ceiling set for the construction of the North Canal, or was there flexibility in the handling of different strata and construction according to the good engineering practices as set down by the Bureau of Reclamation as the situation may be encountered on the ground?

Mr. P. J. Gallagher: Just a moment. That contract is in evidence, your Honor, and if that thing is in the contract the contract itself would be

(Testimony of R. J. Newell.)

the best evidence, and, besides that, it is wholly immaterial as to the issues involved here whether there was flexibility in the contract and in the price.

The Court: Well, I think he may answer. A good deal of [411] this has no weight with me, I will assure you, because he is testifying generally, and I know just as much about it generally. I have been looking at the contract and the thing on the ground and I know that in a general way it was constructed according to the specifications, but that doesn't help you any in this situation, because you have to prove, as I understand it, that you are going to make out your case that this particular section was constructed in a way which was conformable with good engineering practice, and if the specifications did not state at that point and make it conform to good engineering practice then this issue would be against you.

Mr. Hess: I will frame that question just a little differently,—withdraw the question there and ask this question:

Q. As construction work was being carried on over the ground, that is, the project, was leeway made or flexibility in the costs? In other words, did the contract—or was there additional money made available for conditions that were extraordinary that you would face and should be protected to prevent excessive seepage?

A. There was not a fixed ceiling on the amount that could be expended under each contract. The project was found feasible under total estimated

(Testimony of R. J. Newell.)

cost, which was made up of items covering the North Canal, among other things, and feasibility would have been affected if the cost had greatly exceeded the original [412] estimate.

Q. What was the cost per acre for the construction of this North Canal?

(Mr. Gallagher here conversed with Mr. Hess in an undertone.)

Mr. Hess: Well, I will withdraw that question.

Q. What was the cost per acre for the construction of this project?

A. The total cost for the entire project was about \$180 an acre.

Q. Was any provision made in the construction of this canal for the runoff of water that may accumulate by rainfall and snow and springs, or other water accumulating and running up above the canal?

A. There was a culvert placed under the canal at every gulch or draw that showed evidence of live water flowing. Sometimes a small draw would be diverted above the canal over to an adjoining draw so that two of them could use the same culvert.

Mr. Hess: I think that is all.

Cross-Examination

By Mr. Gallagher:

Q. Mr. Newell, your work in the construction of the Owyhee Project was largely supervisory, was it not?

A. Yes.

(Testimony of R. J. Newell.)

Q. And, assuming that you and Mr. Bond prepared the plans [413] and specifications and feasibility report, after the contract was let a new corps of engineers came into the territory for construction purposes?

A. I was the head of the new corps of engineers from 1933 on.

Q. Mr. Banks worked on the project?

A. That is right. He was in charge of all construction prior to 1933.

Q. And the project had gotten along, substantially well along, by the time Mr. Banks was called to other fields?

A. He had practically completed the storage reservoir and the main tunnels and five miles of canal.

Q. Five miles of the North Canal? A. Yes.

Q. That would take you from the siphon at the Malheur River—or at the Owyhee River, around towards Nyssa Butte?

A. No, his work just reached the crossing of the Owyhee River.

Q. I see.

A. I am not sure that that five miles is very accurate, but——

Q. That is right; but from that time you took over the supervision. Who did the field work? Who was in charge of the field work?

A. Mr. Boden was in charge of most of the North Canal.

(Testimony of R. J. Newell.)

Q. When was water turned in? You say in 1935? [414]

A. That is right.

Q. The canal has at the head a capacity of 1100 second-feet?

A. That is my recollection.

Q. What point do you term the head of the canal, Mr. Newell?

A. The outlet of the No. 1 tunnel, where it divides between the North Canal and South Canal.

Q. I see; and is there a control gate there?

A. There is.

Q. And the capacity, then, as the canal goes through the siphon and across the Owyhee River is 1100 second-feet, approximately?

A. That is right.

Q. Then where is the next control gate?

A. There is some control at the head of each major lateral.

Q. Yes, I know there are a number of laterals and each lateral has a headgate and to that extent there are controls, but is there any other major control on the canal and, if so, where is it?

A. Do you mean waste-ways?

Q. Anything that you can turn water out of the canal and turn flow into the canal,—call it waste-way, whatever you want to.

A. The head of every lateral and every individual turnout would so serve to some extent, and the first operating waste-way is in Market Gulch. [415]

Q. The water comes down from the head and on down to Market Gulch and there is your first waste-way, first major waste-way?

A. That is right.

(Testimony of R. J. Newell.)

Q. As a matter of fact, it is the first waste-way other than lateral gates?

A. There is a waste-way in Tunnel Canyon, and no more until Lockett Gulch.

Q. What is the capacity of the canal at Lockett Gulch, would you say?

A. I don't remember closely.

Q. There isn't a large amount of water used above Lockett Gulch, is there?

A. Oh, there are two big laterals, the Kingman and the Mitchell Butte, each of which must irrigate, I would think, seven or eight thousand acres.

Q. The amount of water that comes down to Lockett Gulch is a great deal more than what comes through the canal at the point of the break?

A. It must be considerably more.

Q. Would you say, assuming that the capacity at the break was 450 second-feet, would you say it was as much as 700 second-feet past the Lockett Gulch?

A. I think that is a fair estimate.

Q. Then the only outlets between Lockett Gulch and the point [416] where the break was were the farm laterals that worked from the ditch?

A. That is correct, and that indicates that our estimate of 700 second-feet at Lockett Gulch is a little high.

Q. A little high. Now, Mr. Newell, how much of the field work did you actually supervise down on the field, so that you can speak authoritatively from personal knowledge as to what makes up the ditch?

(Testimony of R. J. Newell.)

A. I had construction of the Owyhee Canal system and spent about two-thirds of the time actually on the work in the field.

Q. Now, there has been some discussion about what you call the core bank and what counsel tried to talk to you about, a core wall. As I understand it, your description and theory of the kind of a core wall you are talking about is to clean off the sagebrush along where the downstream side of the bank is going to be, or the bank on which you are going to build the core, then you scarify that with plow furrows, and they are ordinary plow furrows set three or four feet apart?

A. Yes, an ordinary plow furrow, and similar scoring by other equipment of about that dimension, yes, sir.

Q. Yes. And, assuming that you are going to build a bank comparable with the downstream side of the bank, how much scarifying would you employ there before you started to build your bank? [417]

A. We would just make a furrow which is required to be 8 inches deep every 3 feet up the slope.

Q. And on that thing you would take the deposit out of the cut and swing it over there with a machine and pile it up?

A. No; in the case where a core bank was needed the tractors and scrapers come through first and build the fill that was necessary for the core bank in advance of the excavating machines.

(Testimony of R. J. Newell.)

Q. Oh, I see. Where would you get the earth for that purpose?

A. Usually it was possible to use the surface of the area to be excavated, but sometimes we had to borrow from fills.

Q. Yes. Do you have any personal recollection of your own or knowledge of your own as to how any bank of any type was built where this break occurred? A. No.

Q. Now, during the balance of your testimony and for my cross examination we understand that your idea of a core bank is something that is built up on top of the surface of selected material?

A. That is right.

Q. Now I am going to ask you—now I am coming back to this matter of construction again. Counsel asked you about the size of the project and the number of acres of each classification and the settlers that came in. As I understand it, there was 101,000 acres, approximately,—now, these figures are all [418] approximate, but very close,—101,000 acres of land that was served by water,—that is, the project was designed to serve 101,000 acres of land. Of that number of acres there was approximately 16 per cent, or 16,000 acres, that was Government land, title hadn't passed out of the Government?

A. I think that is correct.

Q. Then the balance of the land, title had passed from the Government at various times prior to the time the contract was signed? A. Yes.

Q. And in that—

(Testimony of R. J. Newell.)

Mr. Hess: Just a minute. He hasn't answered.

Mr. P. J. Gallagher: Yes, he has. He said, "Yes." Am I right? Did he answer?

The Court: Yes.

Q. (By Mr. P. J. Gallagher): In that contract what we call the old land—or that isn't the right term, either,—the deeded lands, we will call them the deeded lands,—there was some of that area that had been irrigated for a great many years, particularly the Ontario-Nyssa Project?

A. That is right.

Q. And the land, the 12,000 acres, under the Owyhee Project is not included in that number of acres, is it?

A. It is not.

Q. What about the lands on the north side of the Malheur [419] River? Did you include in that figure the lands that had previously been irrigated by pumping plants down there, Mr. Newell?

A. We did.

Q. And there were some lands on the north side of the Malheur River that the title was still in the Government when the contract was signed, were there?

A. There was.

Q. Now, can you tell me whether or not there are any lands in the project now where title has not passed from the Government,—I mean irrigable lands?

A. There are a few very small tracts.

Q. Odd acres here and there, five acres?

A. Well, up to, I think, twenty acres on the largest I remember.

(Testimony of R. J. Newell.)

Q. Some of those are feasible and some not?

A. Oh, none feasible as a farm unit, I think.

Q. I see.

A. They would be of advantage to adjoining landowners.

Q. Now, these other breaks that counsel asked you about, where did they take place? There was one, you say, at Cow Hollow that you remember very well, then one at a point about ten miles above the break that we are talking about.

A. I remember there was a break in Cow Hollow and I was there before it was completed, but I am not sure just how long the water was out of the canal. [420]

Q. Are you familiar enough with that area to be able to say whether the canal followed about the same type of structure as it did down at Mile Post 36?

A. No; the canal where it broke in Cow Hollow was in deep cut.

Q. In a deep cut? A. Yes.

Q. Now, what other breaks do you recall on which you can give me some idea as to the nature of the terrain that it was built over?

A. The 1940 break between the Owyhee River and Mitchell Butte was at a point where the canal was located around the end of a ridge, a rocky ridge.

Q. That would be somewhat like this Mile Post 36 break? Or would it?

A. No, it was a more dangerous looking situation, I considered, than this one.

(Testimony of R. J. Newell.)

Q. And do you recall other breaks, Mr. Newell? What I mean, breaks of substantial size and seriousness?

A. I don't remember others that required unwatering the canal for more than a day.

Q. Have there been a number of small breaks that required some attention and turning the water out for short periods of time.

A. In laterals, yes. [421]

Q. But not in the main North Canal?

A. I think not.

Q. Now, on your core bank, when the land is scarified along the proposed ditch bank and the engineer in charge determines whether or not you will have to bring in new fill, that is put in and packed with the equipment that you have at hand?

A. That is right.

Q. And at a certain time the cats—not cats, but the draglines, or whatever equipment you use to excavate with, swing over the material and pile it up on the bank?

A. That is right.

Q. What is done with the compaction of that bank after you get past the core wall stage?

A. Nothing.

Q. And the height of the bank depends entirely upon how much land you must waste out of your cut?

A. That is right.

Q. And that is leveled off and you have a highway up there?

A. Right.

Q. Now, do you recognize the fact that there might be danger in cross-cutting a porous stratum

(Testimony of R. J. Newell.)

that would soak up the water where there is no core wall of the nature that would cut that porous stratum off?

A. Wherever specially pervious stratum was encountered it should have attention. [422]

Mr. P. J. Gallagher: Will you read that question—or, not the question, but the answer?

The Court: Yes.

(Last answer read.)

Q. (By Mr. P. J. Gallagher): Mr. Newell, have you examined these pictures, especially the one marked Exhibit 73, and other pictures that show the north or mountainside bank of that canal out there? A. Not carefully, no.

Q. If they show that there is present out there now embankment that contains just loose river gravel, would you say that that might indicate a dangerous condition? A. In the upper bank?

Q. In the upper bank?

A. Not necessarily.

Q. Well, you say “not necessarily.” Do you mean that there might be danger there but you want to qualify the statement?

A. If the gravel, loose gravel, extended into the bottom and to the outside, then certainly it should be dug out and blanketed, but if it is just in the upper slope then I am not much concerned.

Q. I see. Well, assuming that your ditch and construction across the country intersects a gravel bed or a bed of porous structure that does get into the bedding of the ditch and under the ditch and

(Testimony of R. J. Newell.)

up the inside bank and of such nature that [423] water would seep into it, would that, in your judgment, be a condition that should be remedied?

A. Yes, sir.

Q. I presume that if the situation out there is as portrayed on that Exhibit 82 that is one that should receive some attention, 82 being the white one with the creek up there, the ditch up there, on the sidehill?

Mr. Lytle: That is 80.

Mr. P. J. Gallagher: Oh, I beg your pardon, your Honor, I am referring to 80. Suppose a condition actually exists as portrayed on there, would you say that that was such a condition that should have some special remedying? A. Is this—

Q. That one, yes.

A. If there is a loose, porous stratum located as the exhibit shows, then it should be corrected.

Q. Now, in your years of actual experience I presume you have seen ditches and canals, Mr. Newell, where water seeped out of the side and water arose at the toe of the canal and even springs came out? I presume you have seen that?

A. Yes, sir.

Q. What would that indicate to you as to the porosity of the canal banks or of the canal bed?

A. If seepage appears on the outside of the bank, then naturally the bank is pervious, and if it appears below the [424] bank, above any farmer's own irrigation, then it would indicate that there was seepage under the bank.

(Testimony of R. J. Newell.)

Q. Now, take a canal that was built, say, in 1934, as this canal was built, and those indications of seepage are present for a number of years, that would lead you to think that water might be seeping through there that would naturally tend to weaken the stability of the canal itself?

A. If seepage had been present in the outside of the bank, then that is correct.

Q. And the longer it goes, the longer the condition exists, the more injurious it is to the bank of the canal?

A. No, I don't think so. I think every year an earth canal stands it is safer.

Q. Well, that would depend upon how much water it has soaked up?

A. No, I would still have the same opinion, that every year an earth canal conserves it is safer.

Q. Do you recognize that as time goes on and the seepage increases there might come a time when that bank got so wet it would have no resistance to the pressure back of it?

A. If the bank itself was seeped and if the seepage increased I would agree with you, yes, sir.

Q. Well, assuming or taking into consideration the fact that this ditch, right in the middle of the irrigation season, without any additional water in the ditch for pressure, no storms [425] or earthquakes or anything, went out, wouldn't that indicate to you that that ditch was pretty wet?

A. That there was a weakness somewhere, yes, sir.

(Testimony of R. J. Newell.)

Mr. P. J. Gallagher: Your Honor, it is after five and I won't complete this, quite, this evening. If I could take a little time tonight I could proceed very early in the morning.

The Court: Well, why not proceed? No use asking so many questions. Let's go ahead. If you think about any in the morning we can take care of that then.

Q. (By Mr. P. J. Gallagher): When did you first learn that this break had occurred, Mr. Newell?

A. The day of the second break.

Q. The day of the second break. So that you are not acquainted with the—Or did you direct any of the things that were to be done in the repairing of the breaks?

A. Not in the first break. I went over it the next morning after the second break and looked it over and consulted with the people there and went out and got them some more equipment.

Q. Now, counsel asked you also about the practice of putting in culverts to take care of stream flow above the canal. There was no provision made for taking care of any surface water in the immediate vicinity of this canal at all—this break, I should say?

A. Oh, there are culverts at rather frequent intervals along [426] the North Canal. I couldn't say just how far distant from this particular point.

Q. Now, you were also asked about why you chose concrete lining at times, and I think you said because you took into consideration the formation

(Testimony of R. J. Newell.)

you built over and the distance the canal was from the valley floor,—That would be an element of danger? A. That is right.

Q. And there is a spot where this ditch is concrete-lined both above and below this break—immediately above and below there?

A. There are two points where this canal is lined, that is right.

Q. Now, counsel also asked you as to why you did not line this particular spot with concrete and you said one reason would be the ever-present element of cost, you didn't think it was necessary for safety at this point. Did you arrive at that conclusion yourself, or was that the judgment of your men that you had working under you?

A. I do not think that I examined that particular point before construction was concluded.

Q. I see. Now, counsel also asked you about costs and talked to you about the cost of lining the whole canal. Assuming that there are a great many areas that this canal could run through without danger of leakage or breakage, have you [427] ever estimated how many spots there are that should be lined according to good engineering practice and in order to avoid danger?

A. I do not recognize any points that should be lined by concrete now.

Q. Well, do you recognize that it would be proper to line various points with earth, the same as you have lined this canal, both to keep it pre-

(Testimony of R. J. Newell.)

served and also to save water? Are there spots of that kind?

A. There spots on sharp curves where the bank is eroded and those should be and are being lined with something that will stop the erosion.

Q. However, you haven't got around to this spot yet?

A. I don't think there is any erosion going on at this point now.

Q. Now, you are speaking of the erosion on the outside wall, the lower bank wall? A. Yes.

Q. So far as you know, had your attention ever been called to the condition of this north bank as to its porosity or danger of soaking up water there prior to the break? A. It had not.

Q. And perhaps you had never noticed it yourself, had you, Mr. Newell? A. I did not. [428]

Q. Now, if you had seen this condition as depicted even by these photographs, and had also considered water seeping from the bank on the lower side, do you think now that you would have checked on that and have done something to remedy that leaking condition?

A. If I had seen water seeping through the bank or immediately at the toe of the bank I would have directed that something be done.

Q. And you would have done that because you would have thought it would be necessary to preserve the ditch? A. That is correct.

Q. Was your attention ever called to the fact that there was a living stream of water running out

(Testimony of R. J. Newell.)

of the arroyo or canyon just above this break?

A. Do you mean upstream or downstream?

Q. Downstream.

A. There is a cut there and I have no doubt it has had some high water two or three times.

Q. Was it ever called to your attention that immediately south of the break and in the Hust field, some hundred or hundred and fifty feet down from the toe of the bank, there is a stream of water flowing there now?

A. I haven't been to see that leak, no, sir.

Q. You are acquainted with the fact that it is there?

A. Yes, sir. [429]

Q. There are other leaks that have developed and are now running water on the Hust ranch above these two breaks? Or do you know?

A. I don't know. Do you mean anywhere above the Hust ranch?

Q. No, on the Hust ranch.

A. No, I don't know.

Q. I think you said that it would have been good practice, if you had discovered this porous area, to overdig it, have it overdug and replaced with other material. That is the statement that is also applied generally not only to this spot but any spot that has that porous material in it?

A. Yes, sir.

Q. And if the porous material is not present in this spot here as indicated in these pictures it would particularly apply to this spot?

(Testimony of R. J. Newell.)

A. Of course, "porous" is a sort of a general term. If it was an especially porous place then it should be dug out and refilled.

Q. Well, if it is porous enough to soak up water, enough to make a spring down below the ditch and wet the land so that the farmer cannot farm, what degree of porosity would you say that was? That would be very porous?

A. There should have to be some source of water to wet up that ground in that fashion. [430]

Q. And a bank that would permit it to go down that way, that would be considered to be very porous?

A. If we assume that the source of the water is from the canal, yes, sir.

Q. Well, you have been in the country a long time and there wasn't much water out there before the bank was built,—about as dry a section as there is in Malheur County.

A. I have always been surprised at the number of places that the range cattle find to drink between here and the Owyhee Dam.

Q. But right in this immediate area you never saw any live water before the canal was built?

A. I don't think so.

Q. Now, you were also asked about the item of cost. As a matter of fact, these farmers don't know yet what they are finally going to have to pay as construction cost, do they?

A. They haven't stopped asking for additional

(Testimony of R. J. Newell.)

construction items yet, and until that time is reached we can't determine the final cost.

Q. That is right; and whatever the cost might ultimately be, under the contract it is all paid for by these farmers anyhow, isn't it? That is true?

A. That is right.

Q. So the item of cost and expense of the project, whether it is \$150 or \$175 an acre, is largely a matter of concern [431] to the farmers and not to the Government? That is true?

A. The Secretary found this project feasible on an estimated cost of \$18 million, and if the cost exceeded that very greatly we would not be permitted to greatly exceed it without a new finding of feasibility or some such arrangement.

Q. Well, of course, what one Secretary finds as to the feasibility might not be indicative of what another Secretary would find; that is true? Or what a New Deal Congress would say was good would be something that another Congress might not say was good?

The Court: That question is stricken. It has no pertinence in this lawsuit.

Q. (By Mr. P. J. Gallagher): Anyhow, it is a question of where the committees in Congress and the Secretary get together on what is feasible?

A. It is necessary for the Secretary to say that—to certify that probably the entire cost of the project can be repaid by the water users under a period allowed by Reclamation law.

(Testimony of R. J. Newell.)

Q. And that is the basis of the feasibility?

A. That is right.

Q. Then if Congress—If the committees in Congress agree with the Secretary, the money is then appropriated?

A. Yes, sir.

Q. And the whole Reclamation law is based on the plan that [432] the cost of the project will be repaid by the actual farmer on the project?

A. That is right.

Q. Some of these old projects, of course, also have electric power?

A. Yes, sir.

Q. So that to the extent of paying off the Government the farmer has the burden of doing that in all these projects?

A. That is right.

Q. Now, do you think that you know enough about the strata where this immediate break took place as to be able to say to the Court as to where the water might go that seeps into that north bank—that west bank? Have you made a sufficient study of it, Mr. Newell, so as to be able to say of your own knowledge or have an opinion of your own as to what might happen to the water going into that bank?

A. I am not a trained geologist and have no thorough examination, but would expect that water that is soaked into the hillside above the canal would just run back out again when the canal was unwatered.

Q. Well, assume, now, that this pervious bed, pervious stratum, was deep enough horizontally, or up and down, whichever way it is, to be fed with

(Testimony of R. J. Newell.)

water during the whole irrigation season, in other words, that the water in the ditch would be pushing it higher into that pervious stratum, and that the bottom of [433] the pervious stratum was below the bottom of the ditch, wouldn't you see a danger of water coming through that pervious stratum and down below the bottom of your ditch and escaping that way? A. It is possible.

Q. And if these drawings and photographs, particularly the photographs, are correct, don't you think that there is quite a probability of that happening here?

A. No, I don't think that water that soaks into that upper bank will go around under the canal and appear somewhere below the canal. I say it is not impossible, but I wouldn't expect it.

Q. How would you account, then, for water showing up in the spring like it does on the Hust ranch, or water showing up on the Shaw ranch, as the evidence shows, before the ditch was lined? Where would you think that water came from?

A. It is agreed that there was seepage under the lower bank before the break——

Q. Yes. I think so.

A. ——and that could be the source of some wet spots below the canal.

Q. Do you think that by putting in the core wall as Mr. Terhune testified was put in you have cut off the seepage through the side of the canal?

A. I think so.

Q. That would lead to the other conclusion, that

(Testimony of R. J. Newell.)

if a core [434] wall of the same type was put in to start with you would perhaps not have had any seepage through it?

A. I think that is correct.

Q. Did you make a study of the probable causes of the second break in the canal, Mr. Newell?

A. Not especially.

Q. There has been testimony here, that I presume you have heard, that water came down and ran over the bank that the boys had built on the afternoon before the second break. You are familiar with that testimony, aren't you?

A. I heard it.

Q. Then there is testimony, also, that the ditch broke just ten or fifteen feet north of where they terminated the core wall and broke the old bank wall. You heard that, too?

A. I heard that.

Q. Have you arrived at any conclusion as to whether the break was caused by water running over the new fill or by the fact that they did not extend the core wall up far enough north when they made their first repair?

A. I have an opinion that it was not caused by the overflow but that the repair did not reach far enough downstream in the first case.

Q. That is your opinion now, that that is what may have caused the second break?

A. Yes, sir. [435]

Q. You perhaps were not out there often enough immediately before these breaks to be familiar with

(Testimony of R. J. Newell.)

the amount of water that was seeping through and showing up there in the Shaw field, were you?

A. No.

Q. Or you probably were not familiar with the amount of seepage, if any, that was coming out through the bank north of where it first broke?

A. That was coming out through the bank?

Q. Well, seeping through the bank, yes, north of where——

A. I have never heard of any seepage through the bank.

Q. You never have? A. No.

Q. Well, maybe the term was too broad. I may qualify that by asking whether you knew that there was seepage coming out under the bank north of where it first broke?

A. I was not familiar with the wet spots in the field below the canal, no, sir.

Mr. P. J. Gallagher: Your Honor, I would like to check this over and don't like to take time to stop. I would like to do that in the morning. I promise to be very brief in the morning.

The Court: All right, recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:25 o'clock p.m. [436] Monday, June 14, 1948, the trial of the above-entitled cause was suspended, the Court taking an adjournment to 10:00 o'clock a.m., Tuesday, June 15, 1948.) [437]

Tuesday June 15, 1948, 10 o'Clock A.M.

R. J. NEWELL

thereupon resumed the stand as a witness in behalf of the defendant and was examined and testified further as follows:

Cross-Examination
(Resumed)

Mr. Gallagher: If your Honor please, I have one more question I would like to ask Mr. Newell.

Mr. Hess: If your Honor please, before we start in with the further cross-examination of Mr. Newell I desire to present to the Court for consideration a prepared order consolidating the cases for trial in Sheff White, Civil No. 3669, vs. The United States of America and all other of the so-called failure-to-deliver-water cases.

Mr. P. J. Gallagher: We have had a copy, your Honor.

The Court: Proceed.

Q. (By Mr. P. J. Gallagher): Mr. Newell, would you know whether or not the contract between the Irrigation District and the Government in this case is a sort of a standard form of contract that you have on all of your projects, or do you know?

A. The contracts with Districts are similar. They could not be called standard contracts, because there are differences [438] to fit each individual case.

Q. But they all contain the same general provisions about payments and the things the Government wants to do, and so forth?

(Testimony of R. J. Newell.)

A. They are very similar, yes.

Mr. P. J. Gallagher: That is all.

Redirect Examination

By Mr. Hess:

Q. Mr. Newell, I am not certain whether the record shows this clearly: Did you go to the canal at the time of the first or after the second break?

A. I was not in this section of the country when the first break occurred. I returned to Boise the day of the second break and came right over the next morning.

Q. Did you observe the canal after the second break had been repaired? A. I did.

Q. Was there anything that you observed at that point, or where the break or breaks occurred, that would indicate in accordance with good engineering practices that the upper bank of that canal should be sealed?

A. There was not. I testified yesterday that there is a weakness and an objection to sealing the upper bank because any water that enters the upper bank should be allowed to come out again as soon as the water is turned out of the canal. [439] It should not be trapped back in that upper bank.

Q. And, based upon your experience as an engineer and your observation, state where this water that would seep up in the upper bank would return? Where would it return or go after it has seeped or

(Testimony of R. J. Newell.)

gone into the upper bank? Would you point that out, if you will, on the exhibit?

A. On Exhibit 80 the stratum indicated as porous in the upper bank would have—The openings in that bank would have been filled up with water to a height of the water surface in the canal and would be held in there by the water in the canal until the end of the irrigation season, when the canal was unwatered, and then it would flow directly back out of that same pervious layer into the canal and drain out the canal.

Q. Would you just be seated, now. In all of your experience as an engineer and in this part of this country where this canal has been built and similar canals, have you ever known of a canal being lined on the upper bank in the manner that has been suggested here?

A. I have never known of or practiced lining the upper bank of a canal with earth. When concrete lining is resorted to the upper bank is lined the same as the lower bank to make smoothness, so that a smaller size canal would carry the amount of water, but usually there are drains put through the concrete lining in the upper bank so that any water from above [440] the canal or any water entering the ground behind the lining can drain back out into the canal and not be trapped behind that concrete.

Q. Now, then, you were asked on cross-examination about seepage being outside the bank of the canal. What would seepage downstream from the canal below the bank and below the toe of the bank

(Testimony of R. J. Newell.)

into a field below indicate? What would it indicate, in particular, if it was a clear flow of water?

A. Any seepage emerging in a field below the canal at any material distance from the toe of the bank would not concern me particularly, and my first guess would be that it came from the farmer's own irrigation and that it would not endanger the stability of the canal bank itself.

Q. Were there any indications whatsoever at the point where these breaks were repaired that there was any seepage whatsoever below since the construction of this repair, that is, since the repairs were made, any place above the farmer's own ditch below the canal? A. There is not.

Q. Now, in your examination and observation after the second break occurred, and with your knowledge of that canal since that time and at this point, will you state, in your opinion, what caused the first break?

A. There had to be a weakness or a hidden defect below the bottom of the canal. The pervious stratum indicated on this [441] Exhibit 80 could not have been there, because if it had been there we would have dug it out and replaced it with selected material, compacted; but if we had failed to do that it would have started leaking profusely immediately after water was turned into the canal and we would have lost that canal in the first few days instead of after twelve years.

Q. Is there now any indication,—that is, since the construction of that canal at the place where

(Testimony of R. J. Newell.)

these breaks occurred, or during the repair or since—Is there anything that would indicate any necessity or advisability of lining this canal at this place with concrete?

A. No, sir. I don't believe in lining any canal with concrete that can be sealed with earth.

Q. How was the canal sealed after its construction?

A. The next operation after construction is completed and before water is being delivered in quantity——

The Court: Now, just wait a minute. This witness has testified, time and again, that he did not know anything about this and was not there at the time. Now, the way this evidence goes in, it indicates that he does know something about it. Now, it is either one way or the other, as far as I am concerned. I don't care anything about general construction of a canal, how you do it generally. If he wasn't there I don't care to hear it.

Mr. Hess: We state that it is evidence of what happened [442] here, what was done on the entire canal.

The Court: No, I don't want to know anything about it. I say that it is entirely immaterial and I don't care to hear it.

Mr. Hess: That is all, Mr. Newell.

Recross-Examination

By Mr. P. J. Gallagher:

Q. Mr. Newell, when you made the statement to

(Testimony of R. J. Newell.)

counsel just now that water seeping through the upper bank of the canal might find its way back into the canal when the water was turned off, that is based on the premise that there would be no other cavity for the water to seep into or no other place for it to go or that it did not seep downward into pervious strata? Do you understand the question, Mr. Newell?

A. I am not sure I understand it exactly, but I have stated that I did not believe it possible for the water seeping into a sidehill above a canal to find its way anywhere except the way it went in.

Q. I see; and you are basing that statement upon the assumption that the water would not percolate downward in the pervious structure through which the canal is built?

A. The canal was not built in a pervious structure.

Q. And you want to stand on that premise?

A. The section of the canal as excavated was not in a pervious structure, yes, sir. [443]

Q. And all of your testimony that you have given here as an expert is based upon the assumption that the canal was not built in any pervious structure?

A. I repeat that the canal section as excavated did not disclose pervious structures.

Mr. P. J. Gallagher: Now, could you read the question that I asked Mr. Newell, so that we may get a direct answer on that?

The Court: Ask him another question.

Mr. P. J. Gallagher: Very well.

(Testimony of R. J. Newell.)

Q. And, notwithstanding the presence of pervious material that is in the canal today and is shown by the various exhibits in this case, you still say that canal was not built through pervious structure? Do I understand you aright?

A. One could not say that pervious spots were not encountered.

Q. Well, do you want to qualify your answer and say spots instead of structures?

A. I have been trying to indicate that there was no pervious structure extending through the outside bank that was disclosed in the excavation.

Q. Well, you were not there when the excavation took place?

A. I was up and down that canal continuously during construction and after construction, although I do not recollect that particular point.

Q. I see; and you have no personal recollection now as to [444] what was disclosed at the particular point where the break took place during the period of construction or thereafter?

A. That is correct.

Q. Yes. Now, it is apparent that every year when the water was turned out at the canal this pervious stratum, or spot as you want to call it, would be obvious to anyone riding that ditch, wouldn't it?

A. There are all limits or grades of perviousness. Any earth is pervious to some extent. Water soaks into the upper bank in any earth material and drains back out after the canal is out of use.

Q. Well, then, Mr. Newell, if you were just an

(Testimony of R. J. Newell.)

ordinary ditch rider and trying to look after the welfare of the security of the ditch and you saw this pervious structure on the upper side of the bank, and you saw or could have seen innumerable seeps in the lower side of the bank, would you have thought that water was seeping through or coming out the lower side of the bank?

A. To the best of my knowledge and belief, there have never been any seeps on the outside of the canal bank itself.

Q. Oh, no, just assume that there are. Just assume that there are seeps to a point where the farmer could not farm his land down in there.

A. That is, out in the field?

Q. All right, below the toe of the bank and in conditions [445] when there was no irrigation in there, hadn't been all spring,—would that make any difference to you?

A. Unless there was flowing water within a reasonable distance of the toe of the bank, and even if it was flowing water and it was clear I wouldn't be much concerned with seepage which was some distance, 50 feet, 75 feet, from the toe of the bank.

Q. What would you say if the record showed that the ditch on the top side of the field and immediately below the toe of the bank had water running in the ditch at a time when the headgate was closed and before there was any water in the canal itself?

A. That would be of some interest if it was not immediately after the use of that farmer's ditch.

(Testimony of R. J. Newell.)

Q. What would you say if immediately below the ditch the land was so wet that the man could not plow it and his machinery bogged down in the soil in the spring before the water was turned into the ditch? Would that be any indication to you of a seep?

A. If there was a wet spot in the farmer's field at some reasonable distance from the canal I would not be much concerned.

Q. You would not be concerned. What do you call a reasonable distance?

A. Fifty or 75 feet. [446]

Q. All right, assume that water was coming out, rising to the surface, immediately under the toe of the ditch in an amount that ran into a perceptible stream, would that make any difference to you in your judging about the safety of the canal?

A. Immediately at the toe of the bank?

Q. Yes. A. Yes, sir.

Q. It would? A. That would.

Q. And taking into consideration this structure, how far from the bank would a ditch have to be before you thought it was safe—I mean a spring or a seep have to be before you thought it was safe?

A. That would depend altogether on the formation, but ordinarily anything 50 or 75 feet from the toe of the bank would not concern me much.

Q. Well, we will take a concrete example. Are you aware that in the Hust field about 100 feet north from the Shaw place and some 150 feet from the bank there is now a stream of water running of 4

(Testimony of R. J. Newell.)

to 5 miner's inches, which has increased as the years go by, would that cause you any concern at all?

A. We have given that flow of water careful attention. The amount of flow is being measured. The source of that flow has been searched for on several occasions outside of the [447] irrigation season and has not been found, and the flow has been clear throughout, I believe, so that the openings itself coming through are not increasing.

Q. And you would be perfectly willing to take a chance and let that situation remain as it is and not have any fear that the canal was in danger?

A. That leak or seep is being watched all the time and if there is a material change or if at any time it started running muddy then something must be done. Until that time, it has been going so long without damage that we are not concerned.

Q. Now, is that true of the other seeps and leaks in the immediate vicinity there, especially the one in the draw to the north?

A. The same reasoning would hold. Whenever there is an overflow of water within a reasonable distance of the canal, the ditch rider watches it; a material increase or the matter of the leak running muddy would demand attention.

Q. All right. Now, then, how would you remedy that?

A. In the case of the Hust place it is quite a difficult matter. I have stated that they have already made a lot of search for the source of that leak and have not found it.

(Testimony of R. J. Newell.)

Q. Was any consideration given to the fact that this west bank of the canal was pervious and incapable of retaining water there? Was that considered? [448]

A. The canal section would be searched for some distance opposite this Hust seep, looking for a possible source from the canal.

Q. All right. Now, do you say that consideration has been given in this particular seep to the porous condition of that west bank in your search for a source of water?

A. I feel sure that they would have paid attention to any porous spots in the canal anywhere near opposite that Hust place.

Q. All right, you are the superintendent of the Project, concerned with the safety of these canals. Has any report been made to you that the engineers or your ditch riders or your water masters have ever made any investigation of that porous west bank of that canal as contributing to the flow going out in the Hust field?

A. No, that is a greater distance than would likely be considered——

Q. Well,——

Mr. Hess: Just a minute. Let him answer.

Mr. P. J. Gallagher: All right. I beg your pardon.

A. ——until the seep showed larger in amount or being muddy.

Q. What you are testifying to, then, Mr. Newell, is office practice or office theory and not based upon

(Testimony of R. J. Newell.)

any report that has been made to you as to the activities or diligence of your [449] field men, is that true?

Mr. Hess: Object to that as assuming a state of facts not existing in the evidence at all. He was out there on the ground and was——

The Court: Overruled.

Mr. P. J. Gallagher: Will you answer that question?

A. Will you read it, please.

The Court: Read it.

(Pending question read.)

A. This seep in the Hust place has been discussed with Mr. Spofford.

Q. (By Mr. P. J. Gallagher): That is one of your other men? A. Yes, sir.

Q. But you have not given it any personal attention at all yourself, have you?

A. That is correct.

Q. And you are testifying now as to what Mr. Spofford, whoever he might be, has given you as his conclusions as to what should take place?

A. That is right. If Mr. Spofford considers that leak dangerous, then he will call on us to join him in looking at it.

Q. I see. And you think he will? You presume he will? Do you want to answer that? You are assuming that Mr. Spofford will report when he finds—— [450]

A. Yes, I believe he will.

Q. All right. Now, if your assumption is right

(Testimony of R. J. Newell.)

that the water which percolates into the west bank of that canal immediately returns to the canal after the bank is dry, how, then, do you account for the first break in the canal that took out the whole segment of the canal over a distance of some 30 feet on top? How do you account for that break?

A. I believe that the first break was caused by a condition below the bottom of the canal under the outside bank.

Q. All right, will you describe the condition you think existed there?

A. There must have been a stratum of material that when saturated lost its stability and ability to hold up the canal bank.

Q. All right, where would the water come from that saturated that segment?

A. Down through cracks in the intervening layer between the bottom of the canal and this particular stratum.

Q. That is, you are now assuming that there was a porous stratum underlying the bed of the canal?

A. I get tangled up with the term "porous," but there was a weak stratum under there which, when saturated, would not support the bank.

Q. All right; and why would it be weak? If you don't like the word "porous," why would it be weak? [451]

A. On account of the character of the material itself that was not sufficiently stable when saturated.

Q. When saturated. And where, again, would the water come from to saturate it?

(Testimony of R. J. Newell.)

A. Down through cracks or crevices in the bottom of the canal.

Q. You are not prepared to say that that water would not come from the source in the west bank of the canal that would seep in there, are you?

A. I can't believe that a stratum that is exposed in the upper bank would be connected with another stratum that is under the lower bank at considerably greater depth.

Q. What makes you say at a considerably greater depth? Have you seen the pictures that have been taken in this case, the exhibits? Will you let me see some of those first pictures of the wash? Will you hand him Exhibits Nos. 28, 29 and 30. Do you discover in those exhibits the stratum that forms the bottom of the canal there, Mr. Newell?

A. I think so.

Q. And that immediately underlies the bottom of the canal, does it not, that stratum?

A. Yes, sir, that is the hard stratum.

Q. Yes. Sandstone, would you say? Or did you examine it?

A. We examined it. It is apparently part of the Payette formation, but I am not a geologist, sir.

Q. I see. Now, looking at Exhibit 80, that drawing there would indicate that that stratum is in the bottom of the canal in a position as shown by the photographs Exhibits 28, 29 and 30; that is true?

A. There is an indication of broken material in Exhibit 28, which is still somewhat under the bottom grade of the canal.

(Testimony of R. J. Newell.)

Q. And that is the stratum you say became weakened to the point where it would not support the structure and was the proximate cause of the bank going out?

A. This broken material of the sandstone or Payette formation would never get weak enough so that it would not hold up the bank.

Q. No matter how much water you poured into it?

A. That is my opinion, yes, sir.

Q. Well, then, all right, why did the bank go out? If that will hold the bank, why did it go out?

A. Because there was a different character of material deeper under the bottom of the canal that was not of that same character.

Q. You think a stratum below what is exhibited in Exhibits 28, 29 and 30 was the fault?

A. I find it difficult to fit elevations to these photographs.

Q. Let's get cleared up on that. Now, do you think there was a faulty construction above the bottom of the canal, as shown in those Exhibits 28, 29 and 30? [453]

A. The exposed part of this hard layer in the excavated section can well have been broken up somewhat.

Q. Well, now, that doesn't answer my question so I can understand it. You testified, Mr. Newell, that the ditch went out, in your opinion, because it was built on a structure that was insufficient to hold it. Now, where would that structure be in relation to the bottom of the canal?

(Testimony of R. J. Newell.)

A. It was from four to six feet below the bottom of the canal.

Q. You mean below the sandstone?

A. That is right.

Q. Away down there? A. That is right.

Q. Then the sandstone layer would be between your weak section and the base under the bank, wouldn't it?

A. And the bottom of the canal, yes sir.

Q. And you think there was a fault away down low that took this thing out? A. Yes, sir.

Q. You think it got its water from cracks in the bottom of the canal?

A. I think it very well could, yes, sir.

Q. And that that would mean it would have to seep through the structure or the stratum that is exposed in those pictures, Exhibits 28, 29 and 30, or come through the side of the canal?

A. It would have to find its way down from the canal into [454] this weaker layer.

Q. I see. And it is your theory and your opinion that it did not come through this porous side of the canal shown exposed here, but did find its way through the bottom of the canal?

A. That is my opinion, that it would have been much easier for water to find its way from the canal through a layer of hard material, somewhat broken, in the bottom than it would to have found its way from one porous layer to a possible other porous layer back in the sidehill.

Q. Well, then, naturally, where the canal is built,

(Testimony of R. J. Newell.)

this porous layer that you say existed must have been discernible, your contractor and your engineers would have seen that if they had been looking?

A. I insist that if they had seen the porous layer, why, they would have corrected it, and if they hadn't seen it there would have been serious leakage and early failure when water was turned in.

Q. Then your conclusion is that if the engineers and contractor did not see this porous structure and did not seal it then it wasn't there; otherwise if they had seen it they would have sealed it, and because they did not seal it it was not there?

A. If they had seen it they would have sealed it, and if they did not we would have lost the canal.

Q. Well, you did lose the canal, didn't you?

A. After twelve years.

Q. Yes; and you can't attribute any other cause to losing the canal than water seeping under the base?

A. You are familiar with our most common cause of failure,——

Q. No. A. ——gopher holes.

Q. Well, that isn't in this case. You don't contend that there are any gopher holes straight down 10 feet, do you?

A. Oh, I doubt that it was a gopher hole, but it would not be impossible.

Mr. P. J. Gallagher: Well, let's leave it with the gopher holes. No further questions.

Mr. Hess: That is all, Mr. Newell.

(Witness excused.)



United States
Court of Appeals
for the Ninth Circuit.

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

Volume II

(Pages 517 to 799)

FILED

JAN - 3 1951

PAUL P. O'BRIEN,

CLERK

Appeals from the United States District Court,
for the District of Oregon.

No. 12689

United States
Court of Appeals
for the Ninth Circuit.

SHEFF WHITE, ORLAND WHITE and JOE
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Transcript of Record
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Appeals from the United States District Court,
for the District of Oregon.

Mr. Hess: Call Mr. Boden. [456]

OSCAR G. BODEN

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

A. Oscar G. Boden, B-o-d-e-n.

(The witness was thereupon duly sworn.)

The Clerk: Oscar G. Boden.

Direct Examination

By Mr. Hess:

Q. Where do you reside, Mr. Boden?

A. At present, at Antioch, California.

Q. How long have you resided there, Mr. Boden?

A. Since late December, 1935.

Q. What is your profession?

A. I am a civil engineer.

Q. When did you complete your graduate work as a civil engineer?

A. I graduated in 1910 from the degrees in Civil Engineering at Iowa State College, Ames, Iowa, receiving the degree of Bachelor of Science in Civil Engineering.

Q. Did you take any other work educationally?

A. In 1923, upon presenting a suitable thesis on work which I had charge of and showing evidence of performing professional work, required for the

(Testimony of Oscar G. Boden.)

full professional degree of Civil Engineer, I received that degree at the same institution. [457]

Q. Now, what work have you had, if you will just state the experience that you have had, in the field, as a civil engineer, and particularly relative to irrigation works?

A. Well, in August, 1910, until the following March, I was engaged on sewer construction at Tama, Iowa. In March, 1911, I secured employment with the Bureau of Reclamation on the North Platte Project in Wyoming and Nebraska. I was there until March, 1925. The first five and a half years was spent on operation and maintenance as engineer and assistant to the Irrigation Manager of the Interstate Division, which comprises somewhat over 100,000 acres. The rest of the time, from September or October, 1916, I was employed on the Fort Laramie Canal, which was on the other side of the river from the Interstate Division. The Fort Laramie Canal serves about 107,000 acres.

During this time I was engaged in location and construction of laterals at the main canal, which at the point where I had it passed some six or seven hundred second-feet.

In March, 1925, I was transferred to the Riverton Project in Wyoming and was there until May of the next year. On this assignment I located and constructed laterals and main canal. The main canal where I had charge of it was somewhat over a thousand second-feet.

Q. How many irrigable acres did it carry?

(Testimony of Oscar G. Boden.)

A. Well, it was over a thousand second-feet. That is the [458] capacity. In May the work was shut down upon orders of the Secretary of the Interior at that time.

In May, 1926, I was transferred to the Kittitas Division of the Yakima Project, with headquarters at Ellensburg, Washington. There I designed and laid out and located the distribution system upon about 70,000 acres; acted in an advisory capacity on that construction and in connection with the construction of the main canal, which had an initial capacity of 1,320 second-feet.

In July, 1930, I was transferred to the Owyhee Project, remaining here until late December, '35. On this assignment I had immediate charge and direction of the location of the South Canal, the North Canal from about, oh, two or three miles this side of the Owyhee River, and of the distribution system. I did not handle construction on the South Canal, but I handled construction on the North Canal and most of the lateral system on the Project.

In December, 1935, upon the request of the Construction Engineer on the Central Valley Project, California, this gentleman now being our Chief Engineer, I was transferred to the Central Valley Project, with my headquarters at Antioch, where I have been since. I have had charge of location, charge of the design and construction of the Contra Costa Canal near Antioch, initial capacity 350 second-feet, terminating in a small reservoir, earth-filled dam, this canal being [459] about 48 miles

(Testimony of Oscar G. Boden.)

long; also two smaller relief canals, and directing the location of the distribution system, which has not yet been undertaken for construction. Also, during my first three years there I was responsible for the location of the first approximately 70 miles of the Friant-Kern Canal, which is about 150 miles from Antioch, this canal having an initial capacity of 4,000 second-feet and traversing much rough and broken and difficult location country.

Also, in that same what was known as the Friant Division, I located about the first 10 miles of the Madera Canal, with a capacity of 1,000 second-feet.

Also on that project the general plan is to divert water from the Sacramento River some 20 miles downstream from Sacramento, across a portion of the delta into the Mokelumne River by means of a proposed 10,000 second-foot canal, a rather short and low-lift pumping plant. We have made investigations on that and that is proposed for construction under my supervision.

Also, I have immediate charge and responsibility for the location and construction of the Delta-Mendota Canal. This canal will divert from a portion of the San Joaquin River known as Old River and goes about two and a half miles to where we have a pumping plant lifting the entire 4,600—The capacity of this is 4,600 second-feet at the head. We will lift the entire canal capacity approximately 200 feet, from [460] which it will flow by gravity to what is known as the Mendota Pool, where in that country the Miller & Lux canals divert. The capacity

(Testimony of Oscar G. Boden.)

where we will dump into the San Joaquin will be 3,500 second-feet.

The principal purpose of this canal is to resupply water taken from the Sacramento River to the Mendota Pool, because the Madera Canal and the Friant-Kern Canal diverting out of Friant Dam will divert water for use in those canals, which at present supplies the Miller & Lux canals.

I may say that before I left the Owyhee Project in the fall of 1935 the authorization for construction of the Black Canyon Canal was approved, and at Mr. Newell's specific request my departure down to California was delayed until I located the first about fifteen miles of this canal, a great deal of which goes through exceedingly difficult country to locate, some of the most difficult in the Bureau of Reclamation works.

I, at times, make trips to our Chief Engineer's office at Denver and while there am frequently consulted concerning canal matters on other projects.

I think that covers it.

Q. Now, just getting to the question of the Reclamation work in the Western states, state whether or not these projects you have described—Are there any comparable projects built by private interests, and what was the condition prior to [461] the time of the—some twenty-five years ago?

Mr. P. J. Gallagher: I don't think that has anything to do with his qualifications or any of the issues in this case, your Honor. Object to it as immaterial.

(Testimony of Oscar G. Boden.)

The Court: Well, I think he might say.

A. I don't know of any private irrigation systems which have been constructed in the last twenty-five years or so of a size comparable to the Contra Costa Canal, which had an initial capacity of 350 second-feet, and certainly none of these larger ones.

Q. (By Mr. Hess): That is, none of these larger canals like this North Canal,—Is that what you are referring to?

A. The larger ones and the Contra Costa.

Q. And how do some of these projects which you have designed and constructed compare in earth strata and difficulties to the strata that you encountered on the North Canal?

A. On the North Platte Project, what is known as the Interstate Canal is on the northerly side of the North Platte River. A very large part of that—That designed capacity was 420 second-feet at the head of the canal, which is over 100 miles long. A very large part of that traverses areas where there is what is locally known in that country as a Brule clay, which is similar in many respects to what we locally know as Payette formation in this country. Brule clay is, generally speaking, more of an, oh, pinkish-brown color rather than the [462] light color as in the Payette formation.

Up at Riverton we had a little different formation: Some little Brule clay and some hard formation of rather blue and green tinge in color, and that was, I would say, somewhat similar to this Payette formation, in that some of it had seams

(Testimony of Oscar G. Boden.)

and in its natural state was hard enough to have to blast it.

The Madera Canal, which is now completed, about 38 miles long, on the Central Valley Project, traverses a good many miles where the formation is locally known as hardpan. It resembles very much the Brule clay on the North Platte Project and in some general characteristics I would say is somewhat comparable to this Payette formation.

Q. Who were the general contractors who did the excavation and work generally in the construction of this North Canal and in the immediate vicinity of the break and breaks that are spoken about in this case?

A. The firm of J. A. Terteling & Sons, of Boise, Idaho.

Q. Now, you state that you had personal charge of the construction of that canal some two or three miles this side of the Owyhee River. How far upstream is that, approximately, from the break or breaks in question?

A. Well, I would judge possibly a little over 35 miles, approximately that.

Mr. Hess: May the witness have Exhibit No. 63, Plaintiffs' [463] Exhibit No. 63.

Q. Would you turn to the drawings shown in the specifications No. 6 and state whether or not that is a section of canal——

A. I don't just see a number on it, Mr. Hess.

The Court: We will recess for a few minutes.

Mr. Hess: Thank you, your Honor.

(Testimony of Oscar G. Boden.)

(Short recess.)

Mr. Hess: Would you read the last question, Mr. Reporter?

The Court: Read it.

(The last question was thereupon read, as follows: "Q. Would you turn to the drawings shown in the specifications No. 6 and state whether or not that is a section of canal——")

Q. (By Mr. Hess): State whether or not that drawing No. 6 as a part of this Exhibit No. 63 concerns the canal at the point of the break or breaks in this case? A. Yes, sir.

Q. And will you describe generally what that drawing shows?

A. Well, these two lines above here, these irregular lines, indicate the elevation along the center line of the canal, and the line drawn underneath the bottom grade of the canal indicates the bottom grade of the canal after it will have been constructed, and these figures down here, like 20,000, 20,000, 10,000, 20,000, 20,000, indicate the number of the station from the head of the canal. A station in our [464] language means every 100 feet. A break has been located as being at Station, approximately, within a few feet, 1906 plus 25, and that is located in a section of the canal known as Earth Section No. 17.

Q. Now, is that Earth Section No. 17 drawn and represented on this map?

A. Yes, sir, that is this figure up here (indi-

(Testimony of Oscar G. Boden.)

cating). It shows the designed base width 16 feet, the normal maximum water depth as being 6.8 feet——

Mr. P. J. Gallagher: Pardon me, Mr. Witness, will you just wait a minute and let me get that, just a second.

A. Yes, sir.

Mr. P. J. Gallagher: Sixteen feet from the bottom?

A. That is correct,—And the normal maximum water depth will be 6.8 feet; and the minimum total bank height 4 feet freeboard, or ten feet eight; and the minimum width on the lower bank, or the crown as we sometimes say, 14 feet. It also shows, by means of a dotted line here, the position of a core bank wherever needed, and the specification provide that where that is built it shall have a height, minimum height, of a foot above the designed water depth, and a minimum top width of 8 feet. The capacity here is computed as being 405 second-feet.

Q. (By Mr. Hess): Now, then, there is a round surface line that is marked on the top, up at what you represent the top [465] or some portion of the upper bank, and goes down through the lower embankment near the top and then continues on for a distance where there is a little dotted line and an arrow pointing upward. Would you describe what that represents or indicates?

A. Well, this general sloping line, that says "Ground Surface," is simply put on there to show the section on a slope. This line could be higher or

(Testimony of Oscar G. Boden.)

lower. That is just simply indicated there. And this dotted line, the extreme right-hand line, I would say, it says "2-to-1 slope where water surface at inside of embankment is 4 feet or more above natural ground surface." In other words, our ordinary outside slope of the bank would be at least one and one-half to one, which means that on such a slope for every foot up, why, the slope line would intersect a foot and a half out, and where the water surface may be at four feet or more, why, this outside slope, we flatten it off in order to give it wider embankment, which would be two to one. In other words, if the triangle would be a foot high here the bottom would be two feet out and flatter slope.

Q. Now, state, in the course of construction as you came to this particular place, and as you come to your ground generally, what security is taken as against seepage, in the protection of your walls of your canal or bottom of your canal?

A. I don't know as I followed that exactly.

Mr. Hess: Would you read it, see if he understands it. [466]

The Court: Read it.

(Pending question read.)

Mr. Hess: I will withdraw that.

The Court: The question is stricken.

Q. (By Mr. Hess): I will ask this question now: This is a part of the plans, this Drawing No. 6 is a part of the plans of the Terteling contract, is that correct? A. Yes, sir.

(Testimony of Oscar G. Boden.)

Q. And state whether or not this canal was constructed according to the plans and specifications—the specifications?

Mr. P. J. Gallagher: Just a minute. This is objected to unless the witness knows of his own knowledge that fact.

Mr. Hess: That is what I am asking.

The Court: The witness may answer, if he knows at this particular spot. I am not talking about the canal generally.

A. It was constructed in accordance with the specifications, yes, sir.

Q. (By Mr. Hess): As you construct a canal, state whether or not field notes are taken and made?

A. Yes, sir.

Q. Were field notes made in this particular section where the break occurred before you proceeded with excavation?

A. We take what is called cross-section notes, the levels, and indicate where the sides of the canal would intersect the ground surface, and we call that at that point a cut of [467] so-and-so many feet and a certain distance out, on both the upper and the lower sides. Also, if the cut on the lower side is less than the normal water depth we would stake out this core bank as shown in Earth Section No. 17, and from these notes the quantities of excavation are computed and used in paying the contractor for his excavation work.

Q. Would you refer to those field notes, please? Have you got them with you?

(Testimony of Oscar G. Boden.)

A. I happen to have here the original cross-section notes, including the—That is, the portion of the canal including where the break was.

Q. Would you refer to that and tell us what page that is, please?

The Court: What exhibit is it?

Mr. P. J. Gallagher: It is no exhibit.

Mr. Hess: It is part of the field notes that were reserved in the exhibits, your Honor.

The Court: Well, what is the exhibit number?

Mr. Hess: What exhibit number is that? Sixty-five? Let me see it, please. Sixty-five, your Honor.

The Court: All right, let's have it marked as a pre-trial exhibit under this number and exhibit it to counsel. I think you can mark it in the front of the book.

(The field notebook referred to was thereupon marked for identification as Defendant's [468] Pre-Trial Exhibit 65-A.)

Mr. P. J. Gallagher: Could we ask the witness one question with reference to this?

The Court: No. Is it your purpose to offer this in evidence?

Mr. Hess: What is it, your Honor?

The Court: Is it your purpose to offer this in evidence, or just to examine it?

Mr. Hess: Well, to testify from it, your Honor.

The Court: All right.

Mr. P. J. Gallagher: We want to cross-examine on this.

The Court: Naturally.

(Testimony of Oscar G. Boden.)

Q. (By Mr. Hess): Referring to exhibit marked for identification 65-A, state what page there or how you designate the page that refers to this particular Earth Section No. 17 as described on Drawing No. 6 of the specifications?

A. Well, the pages aren't numbered here, but the cross-section notes continue, and at the point, at the site where the break is located as being Station 1906 plus 25 the original cross-section notes as taken in the field are shown here. Is that an answer to your question?

Q. State whether or not the cross-section notes show that the canal was constructed at this point as set forth in the drawing, or just what it does show.

A. It shows the extent to which excavation for the canal [469] was to be made and the amount of the core bank.

Q. Would you tell us what that was?

A. Well, at Station 1906 plus 25 feet back of the location of the break it shows that on the center line of the canal there was a cut of 17.6 feet. On the lower side, where the slope, the inside slope, of the outer bank would intersect the natural ground slope, the cut was 9.3 feet at a distance of 22 feet from the center line; and then it shows that the projection of the normal high water surface would not have intersected the natural ground surface until a distance of $24\frac{1}{2}$ feet from the center line. It also shows that the fill at the outside edge of the core bank would have amounted to a foot and four-tenths

(Testimony of Oscar G. Boden.)

in depth at a distance of 30.8 feet from the center line.

Now, at 25 feet downstream from the break, or Station 1906 plus 50, the center line cut would be 19.2 feet, the cut on the lower side 9.7 feet, which, by the way, is——

Mr. Lytle: May I have that last figure again, please?

A. 9.7 feet at $22\frac{1}{2}$ feet from the center line, this being 2.9 feet greater than the water area. It shows also that a projection of the water surface would intersect the ground slope at $25\frac{1}{2}$ feet from the center line and that the fill at the lower toe of the core bank would be 1.3 feet at 30.6 feet distance, and it also shows, of course, the depth cut each side. And over on this other page the computations for the [470] quantities, and it shows that in that 50-foot distance there the core bank was very minor in amount, on account of the depth cut on lower side being only 3 cubic yards, as computed here. From the cubic yards for excavation as computed in the cross-section the items for payment are made up. In other words, these show pay quantities between those particular sections, and in addition to that there might be extra work, other things that would have to be added to it.

Q. (By Mr. Hess): Now, then, in just plain English language, so it will be indicated, how far do the field notes show a core bank in connection with the actual repairs that were made in both

(Testimony of Oscar G. Boden.)

the first and second breaks in this case, upstream and downstream?

A. Well, if we go away back here to the page preceding, it shows 600 or more feet, and it goes back in number, in distance, and the break was at 1906 plus 25, and it shows core bank proceeding on the lower side of the canal—here at this Station 1912 plus 25, some 600 feet beyond the point at which the canal broke.

Q. In which direction? A. Downstream.

Q. Downstream. What does it show upstream?

A. Well, I stop at 600 feet. It continues on back for a considerable distance. On the downstream end there it shows that we ran into a heavier cut there at about 600 feet, but there [471] wouldn't be any core bank there, and some distance it starts in again.

Q. How far up above where the break occurs?

A. I will have to look——

Q. That there wouldn't be any core bank where? Where does that apply with reference to the break?

A. We didn't have any core bank where there would be a very deep cut, didn't have any requirement for it. At the site of the break we didn't have a core bank because of the water depth, but we built an extra small core bank just as an added precaution.

Q. But, in any event, as I understand your testimony, the core bank that was constructed was for the entire length of this particular repair that was made, is that correct?

(Testimony of Oscar G. Boden.)

A. Oh, yes, some distance each side, continuous.

Q. Now, will you describe to the Court the construction of the core bank?

A. The specifications provided—and strict adherence was insisted upon that work carried out in accordance therewith or even better to some extent—provided that where the water surface in the canal was——

The Court: Now, just a moment. I strike that introduction because the witness is apparently testifying what would have been done. I want to know what was done, if you know.

A. We did whatever this—— [472]

The Court: All right, that is all right, now, tell just what you did on the ground. That is what I want to know.

A. All right. At the point here this core bank was staked out and was constructed in accordance with the specifications, which provided that before the main canal, that is, the major excavation was performed the core bank should be built in advance of the principal part of the excavation, of selected material and in a manner as directed by the contracting officer, and which——

The Court: That doesn't mean anything to me, "in a manner as directed by the contracting officer." I want to know what was done on the ground, if you know.

A. All right, we built that with excavating equipment, such as bulldozers and carryalls, and

(Testimony of Oscar G. Boden.)

compacted the embankment of selected fine materials.

The Court: And it was 8 feet wide?

A. That was the minimum. Sometimes we made it wider.

The Court: I don't care anything about what you did sometimes. I want to know what you did in this place. Do you know?

A. That shows 8 feet, and that is the way we built it.

The Court: All right. Now, how high was this original structure at the point of the break, 1906 plus 25?

A. On the side near the center line there was no fill because it was—that was at $24\frac{1}{2}$ feet at 25 feet back of it, and at [473] 25 feet beyond there was no fill at $25\frac{1}{2}$ feet. Then in the case of the 25 feet upstream the outside fill would have been 1.4 feet.

The Court: You mean at the point of the break you made no fill and therefore the core bank was built above the original structure?

A. We built the core bank above the original ground structure, yes, sir.

The Court: In other words—

A. And the height at the outside toe of this core bank 25 feet back of it was 1.4 feet, and 25 feet the other way was 1.3 feet. In other words, the depth of cut was such that the fill was very low. Does that make it clear?

The Court: Then at water level why would the

(Testimony of Oscar G. Boden.)

water be—you mention water level—the water would be not against the core bank but against the original structure? A. That is right.

The Court: I understand. Pardon me for the interruption. Go right ahead, Mr. Hess, now, with whatever you want.

Mr. Hess: Thank you, your Honor.

Q. Referring to Exhibit No. 80, this drawing, was there anything at the bottom of the canal where constructed that indicated a stratum as shown in this drawing 80?

A. Our practice was, where we——

Mr. Lytle: We object to the statement of practice as not [474] being responsive to the question.

The Court: You have to testify here to your knowledge, that is, as far as you remember it. If you don't remember, you will just have to say so.

A. Well, wherever we struck a so-called porous stratum, or what we thought was so, we dug it out and put selected fine material in.

The Court: Do you remember this place?

A. I will have to give a little explanation, if you will permit me.

The Court: All right.

A. During the construction of the canal, even, inspectors and anyone connected with it from our forces were constantly instructed to be on the look-out for what they thought were possible porous strata or weak spots, and we had inspection along and they made the reports personally—I was out over the work most of my time—and it is incon-

(Testimony of Oscar G. Boden.)

ceivable to me that, with the number of employees, including myself, making constant inspection of the work, that we would have overlooked any place that appeared to be a so-called porous stratum. If we had seen it we would have overdug and filled in.

The Court: Well, of course, that hardly answers the question. You know, we are all human——

A. Yes.

The Court: ——and all make mistakes, even judges—and [475] the thing that they are trying to find out from you is as to just how much at this date you know about how much was actually done personally. That is, not what the construction should be, but how much you remember of this particular spot from your own recollection.

A. Well, of course, this was done fourteen years ago. It is difficult to——

Mr. Lytle: We have difficulty hearing the witness, your Honor.

The Court: Speak up so counsel can hear you.

A. I beg your pardon. I say that was work performed some fourteen years ago and it is difficult to recall each—just any particular spot, that is, within a few feet, but I would say that if a porous layer or stratum was envisaged or seen at that point that corrective measures were taken, in view of the fact that every effort was always made to make the canal safe and everyone was so instructed.

The Court: But you don't remember?

A. I couldn't swear that I——

The Court: Nobody is blaming you for that——

(Testimony of Oscar G. Boden.)

A. A matter of 25 feet, or something like that.

The Court: As a matter of fact, I should distrust you if you swore that you could remember.

Mr. P. J. Gallagher: Now, just a minute. We move to strike the testimony of the witness given in response to the [476] last question because it is not based upon a personal recollection of what took place and what the facts were, but merely a question of what the practice was.

The Court: No, I think the testimony should stand, because I think the witness is trying to be perfectly fair, and, as I say, it is in the record for what it is worth. I am the person to decide what weight it will have.

Mr. P. J. Gallagher: I may say to your Honor that I trust your Honor implicitly on that.

The Court: Well, you will have to.

Q. (By Mr. Hess): Mr. Boden, based upon your experience as an engineer and your actual experience in the construction of many miles of this canal, North Canal, as you constructed it state whether or not the canal would have held and carried water through the canal for any considerable period of time if there had been a stratum entering the bottom of the canal as indicated in this Exhibit No. 80? A. I don't think so.

Q. Will you give your reasons, tell the Court your reasons, for that?

A. Because if there had been a very porous stratum water would have entered and found its way through in much less time than the somewhere

(Testimony of Oscar G. Boden.)

twelve years that the canal operated successfully before this break occurred.

Q. Viewing these exhibits, picture exhibits—you were here [477] when they were introduced and explained by Mr. Merritt? A. Yes, sir.

Q. —is there anything indicated on any of the exhibits, or according to your observation on the ground and in the construction of this portion of the North Canal, that would indicate a sealing of the upper bank of the canal at or near the points of the breaks in the canal?

A. I was not here at the breaks so I can't speak of how the break looked, but during the construction—I am not sure that I understood your question correctly—if I may have it read.

Mr. Hess: I would like to have that read to the witness again, your Honor. I would like to have that answer read.

The Court: All right.

(Last question and answer thereto read.)

A. —during the construction we made no effort on the upper side of the canal to seal off what might have been termed porous stratified layer, for the reason that we felt no concern in that respect about the safety of the canal. I am not familiar enough with these photos, not having seen the ground, to feel competent to say just what they represent.

Q. (By Mr. Hess): Well, I will ask you this question: If strata would be revealed as indicated in Drawing No. 80 on the upper bank of the canal,

(Testimony of Oscar G. Boden.)

state whether or not, in your opinion, good engineering judgment would require or not [478] require the sealing off of that upper bank? A. No, sir.

Q. Give your reasons.

A. I don't think that it would add to the security of the canal, as your breaks would not occur on the upper side of the canal, they would, if at all, be on the lower side, and sealing, if water got in there, would entrap the water and would prevent or at least greatly retard its return in the canal when water was taken out and, in my opinion, would add nothing to the safety of the canal.

Mr. Hess: That is all.

Mr. P. J. Gallagher: Shall we proceed with cross-examination?

The Court: Yes.

Cross-Examination

By Mr. P. J. Gallagher:

Q. Will you let us have that exhibit that was marked—the one he has in his hand?

The Court: Sixty-five.

Mr. P. J. Gallagher: No, no, the field notebook.

Mr. Lytle: 65-A.

Q. (By Mr. P. J. Gallagher): Mr. Boden, I am now referring to what has been marked as Exhibit No. 65-A that you have had before you in your testimony. I will ask you if you know when these field notes were made in relation——

A. The dates are shown on the top of the page. I believe it [479] is February 2nd, '34. Also, it

(Testimony of Oscar G. Boden.)

shows there the names of the field party, the men who did the work.

Q. And when you answered that question you answered only from what information the book gives you? You don't know when they were made in relation to the time when the work was done?

A. The dates upon which notes were taken were always shown in the field book.

Q. You are now testifying to a general practice and not to anything you know about?

A. I know that these notes were taken on that day, because the personnel taking them were reliable men, and the dates shown, there was no reason whatsoever for making a different date.

The Court: And they were under your supervision? A. Yes, sir.

The Court: Now, the rule, of course, is entirely different with regard to records than the other situation we have been talking about. Engineering practice and conforming to the specifications is a thing that even a supervisor can't testify to with respect to a particular place, but he can testify as to records which are kept under his supervision in the ordinary course of work, and those thereupon become primary evidence.

Mr. P. J. Gallagher: Very well, I won't pursue that any further. [480]

Q. Now, when were these field notes made, then, in relation to the time of construction?

A. Before construction. They would have to be,

(Testimony of Oscar G. Boden.)

because they show the excavation limits and the depth.

Q. Now, on the point that you have designated as 1906 plus 25, you stated that the ditch at that point, or canal at that point, was built under the surface of the ground, that is, below the surface of the ground, and consequently would have required very little core bank at that place.

A. Yes, sir.

Q. Could you examine this and tell me how many yards there was put into the core bank at that particular point?

A. In a distance of 50 feet, 25 feet above and 25 feet downstream——

Q. Twenty-five feet above and 25 feet below?

A. Yes, sir, there was 50 feet.

Q. Fifty feet of space.

A. Twenty-five feet each way—according to the computations, sir, the fill was so small that only 3 cubic yards, figured to the nearest cubic yard——

Q. That would be 3 cubic yards over a distance of 50 feet? A. Yes, sir.

Q. And those notes show on what part of that 50 feet the core bank was placed?

A. A cross-section was taken at the limits of this 50-foot [481] stretch.

Q. That would be 3 cubic yards spread out over a distance of 50 feet, and how wide an area?

A. Oh, that was very little there, because on the inside of the bank it did not require any.

Q. So it must have been very little.

(Testimony of Oscar G. Boden.)

A. Oh, I misspoke myself. I looked in the wrong column—if I may correct myself.

Q. Very well.

A. There were 50 cubic yards.

Q. Fifty cubic yards? A. Yes, sir.

Q. Now, give me the dimensions of the area——

A. No, wait a minute—pardon me, I got the wrong number.

Q. Well, take your time and get the right column.

A. Yes, sir—3 yards.

The Court: I think, in view of the situation, I will give you a chance to study this yourself and the witness a chance to study it and I will recess until one-thirty.

(Whereupon, at 12:10 o'clock p.m., Tuesday, June 15, 1948, a recess was had until 1:30 p.m.)

Afternoon Session, 1:30 P.M.

OSCAR G. BODEN

thereupon resumed the stand as a witness in behalf of the defendant herein and was examined and testified further as follows:

Cross-Examination
(Resumed)

By Mr. P. J. Gallagher:

Q. Mr. Boden, did you finally check this exhibit you were testifying from to determine the exact yards you had in the core wall?

(Testimony of Oscar G. Boden.)

A. The notes show there that in that 50 feet, according to the calculations, there was 3 cubic yards.

Q. Three cubic yards? A. Yes, sir.

Q. Now, that would be over an area 50 feet long and how wide? What is the base of your core?

A. That one section there, the base is about 3.8 feet, and the other 3.6.

Q. That is, in width? A. Yes, sir.

Q. 3.8 feet, and the other was 3.6, by 50 feet. In preparation for the core wall, as I understand it, the sagebrush is cut off the bank and——

A. If there was any there.

Q. If there was any there—and then the ground is scarified by some plowing to make the union between the core and the——

A. The furrows 8 inches deep and not farther apart than 3 feet. [483]

Q. Then when that is done you bring in the material to spread out?

A. The fine material is brought in by some form of scraper and carryall and deposited and then gone over by the machinery and packed.

Q. This 3 cubic yards could not have given very much depth to your core wall.

A. There wasn't a great deal of depth required. It was very shallow. In fact, we could have gotten along well without the core wall on account of the excess on the other side. It was simply an added precaution.

Q. Now, the purpose of the core wall is placing

(Testimony of Oscar G. Boden.)

in the bank a stratum of impervious material so the water could not soak through? That is the purpose?

A. That is basically the purpose, yes.

Q. Then on top of this core wall, filling the bank on up, you just take the spoil dirt from the canal?

A. Well, generally speaking, except effort was made to place the finer selected materials available to even increase this minimum core bank, and the rest is just thrown all over.

Q. I am trying to confine myself, Mr. Boden, to the section here where the canal broke and trying to get your testimony as to just how that bank was constructed, and to that extent I wish you would confine your answers to exactly what happened there, as far as your records show. [484]

A. Well, after we have the core bank in it would it be permissible to excavate the entire cross-section of the canal and throw it out to build up the bank at least to a minimum height and width. However, in doing so we would attempt to put added fine selected material on top of the core bank in order to achieve more than the minimum.

Q. Now, these field notes and plans and specifications, of course, are all drawn up and the field notes made before there is any excavation?

A. That is right.

Q. And whether or not a pervious structure was found in the canal bed would not be reflected in these field notes, would it?

(Testimony of Oscar G. Boden.)

A. That would have no bearing on the cross-section.

Q. No. Now, you have no written evidence nor field notes nor other information here, have you, to indicate whether or not your contractors or your field men found pervious structures in the bank?

A. That would not show in these notes.

Q. Well, have you any other data that would show?

A. Offhand, I couldn't say, unless we had access to inspectors' and other employees' reports which they secured in the inspection of the work.

Q. And have you seen any of those? Have you seen any such report indicating a porous structure in this canal bank? [485]

A. If the reports indicated such a stratum I am positive I would have seen it.

Q. No, no, but have you seen it? Have you seen any?

A. That I must qualify by saying that my memory in fourteen years can't—

Q. You have no recollection of seeing any such a thing?

A. I would also qualify that by saying that at this date I could not positively say that I saw those notes.

Q. I see. Well, ordinarily, if your field men or your inspectors would find a porous structure in the excavation they would file such a report, wouldn't they?

A. Yes, sir.

(Testimony of Oscar G. Boden.)

Q. But, so far as you are concerned, you have no recollection now of that being called to your attention? A. Not now, fourteen years later.

Q. No; but we agree on this, do we not, that if there was a porous structure discovered in the excavation good engineering and good construction would require that porous material to be taken out and excavated and better material put in?

A. Yes, sir, if there were any reason to think that it would endanger the canal, other than being just a little spot that you felt that would do no harm, you wouldn't, probably, do it; but if there were any amount, why, it would be cut out and finer material put in.

Q. That could be also rectified and remedied by sealing over [486] the portion where that porous material was found?

A. Well, such removal and filling in with fine selected material would in effect be the sealing.

Q. There was no sealing placed on the lower side of this canal while you were in charge, was there? A. In spots we did, yes, sir.

Q. Well, now, I am trying to limit myself to the area where the break occurred.

A. You say you are limiting it?

Q. Yes.

A. To that I must make the same answer: Fourteen years later, I cannot positively say that.

Q. And there are no estimates on file indicating that your subordinates or yourself determined that it was necessary to seal the inside of this canal?

(Testimony of Oscar G. Boden.)

A. If it were determined necessary there would be records of that in the Project offices, I am satisfied.

Q. And the fact that there are no such records indicates to you that there was no sealing done?

A. I wouldn't say that there are not any records. I said that if a porous place were discovered there would be records. I didn't say there were no records.

Q. Now, this core wall that you have described as having placed in the canal would have no efficacy or would not tend to cut off a water flow or seepage that affected the banks of [487] the canal below the point of the base of the core wall, would it?

A. I am not just sure I understand your question correctly.

Mr. P. J. Gallagher: Well, maybe the Reporter will read it to you better than I can repeat it, if the Reporter can read it.

The Court: Read the question.

(Pending question read.)

A. It would depend upon the natural ground in place below the core bank.

Q. Yes. A. That is self-evident.

Q. And if that ditch crosscut a porous section or stratum, and the core wall being placed up in the air, where you had put it, on top of the bank, would have no efficiency in cutting off the flow of water that came through the porous structure below, would it?

A. That is practically the same question, isn't it?

(Testimony of Oscar G. Boden.)

Q. Yes. A. I answered that.

Q. By a qualification. Now can you answer it directly?

A. I must make the same qualification,—My memory in fourteen years does not—

Q. No, this does not depend on your memory, Mr. Boden, and you follow me and I will try to make it plain. What I wanted [488] to ask you, a core wall placed in the bank at the point you say it was constructed would not cut off a leakage in the ditch at a point below the base of the core wall?

A. If there were leakage below the core wall, the core wall, of course, would not stop that.

Q. I see.

A. Dependence would be made on the natural ground there.

Q. Have you heard the testimony of the other witnesses in this case that described how they finally repaired the ditch? A. Yes, sir.

Q. Particularly the testimony of Mr. Terhune that the cutting—

A. That was the gentleman that had the equipment, yes, sir.

Q. —that they cut a core deep in the bed of the ditch and built that core up and it held for the portion that the core wall was put in? You heard that testimony? A. Yes, sir.

Q. If a similar core wall was put in this ditch cutting off any pervious strata, it would in all likelihood have held?

A. I wouldn't say that. In my best judgment,

(Testimony of Oscar G. Boden.)

based on experiences I have had with other canals such as this, it is my judgment that such a core wall would not be necessary.

Q. Well, would you have any other way of stopping that water from cutting your bank away?

A. If there were porous strata there that we encountered we would have removed sufficient of that and refilled with fine [489] material to have effected a blanket, you might say, that would retard water.

Q. And that would have been good engineering?

A. Yes, sir.

Q. Well, now, do you take the position that there is no porous material in the banks of that canal or near the bottom of the canal? Do you take that position?

A. Do you mean at the point of the break here?

Q. Yes, at the point of the break?

A. From the evidence that I have heard, I am not convinced that there is a decided porous layer there that extended into the lower bank.

Q. Well, are you convinced that there is a porous structure there?

A. No, sir.

Q. You think not?

A. I am not so convinced.

Q. Now, assuming—Taking a look at Exhibit No. 73—that the bottom part of that picture showing that stratum is made up largely of gravel, rock, and other sedimentary formations that you see there, would you say that was or was not porous, looking at that picture?

(Testimony of Oscar G. Boden.)

A. As I stated before, I was not present at the break and did not see it and I could not say that that represents the break as it existed at that time, from my knowledge. [490]

Q. Well, assume that it does, assume that that is an accurate photograph of the conditions there, would you say that that reveals porous material?

A. I wouldn't say so, necessarily, no, sir.

Q. You think with that sand and gravel that it is watertight?

A. It often is. You strike a streak of gravel,—You call it cemented gravel, conglomerate and very watertight—and you would have no fear of going through it, you would have no fear of it causing a break.

Q. Well, would you say that gravel such as you see depicted in that Exhibit 73 was cement gravel or watertight gravel? I just want to get at the basis of your—

A. I say I am not sure that that, as you say, depicts cemented gravel or anything else.

Q. What do you think it is?

A. Beg your pardon?

Q. What do you think it is, what type of gravel?

A. Well, it is just a picture to me. Not having seen the picture,—You show me a picture, and I don't know whether the break was there or someplace else.

Q. You are not giving any credit to the veracity of that picture at all?

A. I am simply saying that I am not familiar

(Testimony of Oscar G. Boden.)

with the conditions at the break there, not having seen it.

Q. And you are not taking into consideration the physical [491] conditions that are shown by Exhibit No. 73?

A. Well, I couldn't say by looking at the picture just what was gravel or something else.

Q. Now, your testimony as to the number of projects you have worked on and the locations of the territories that you worked in, they were really structures similar in type to the structure here in the North Canal?

A. Similar to what we call—That is, it has some characteristics that we would call the general Payette formation. I don't know that there is a scientific term, but that is the general term that we apply—

Q. Well, to make it apply a little closer, would the general canals you have worked on be similar to the general sections of the North Canal in the vicinity of where the breaks occurred?

A. There would be similar places, yes.

Q. There would be outcroppings of formations, some places you call it hardpan, some places you call it Brule earth, and some places something else, but they would be all deposits placed in there by some earth movement?

A. Yes, sir.

Q. But the mere fact that in the construction of the North Canal you ran into some difficult materials was not extraordinary, was it?

A. Oh, no. [492]

(Testimony of Oscar G. Boden.)

Q. And you have had experience in handling similar structures at other places?

A. Yes, sir.

Q. Now, in your testimony I think you said you began to supervise at a point four or five miles down from the head of the canal.

A. Oh, that may be a mile or two off, but that would not apply.

Q. Yes, I appreciate that,—And that took you over what you call the Mitchell Butte section?

A. Yes, sir.

Q. Now, were you here when the break occurred in the Mitchell Butte section?

A. No, sir.

Q. You were not here. It appears from the evidence that there was a break in 1940 and again in 1942 over the area upstream from where this break took place. That would naturally be in the area that you were supervising the construction of.

A. Well, I would have to have the location of the break located—I mean placed more definitely and go back to the records to find the exact point from which I had supervision of the construction.

Q. You know where the Mitchell Butte break took place, don't you? [493]

A. I haven't been there, sir.

Q. No, no, but do you want to tell this Court now that you have no idea where the Mitchell Butte break took place?

A. I was in California at the time and haven't been up here and viewed the point, so I could hardly

(Testimony of Oscar G. Boden.)

be expected to say that I know exactly where a break was when I never saw it.

Q. I know, but don't you have any confidence in what you hear from your subordinates?

Mr. Hess: Now, we object to that, your Honor, as not proper cross-examination. We have been confined here to this particular spot.

Mr. P. J. Gallagher: Yes.

Mr. Hess: To what happened at this break.

The Court: Yes, but the question of whether he has confidence in his subordinates has nothing to do with it, I will say that right now.

Q. (By Mr. P. J. Gallagher): So you are not prepared to say that you know anything about where the Mitchell Butte break took place?

Mr. Hess: We object to that as immaterial and not proper cross-examination.

The Court: No, he has a right to ask the question.

A. I don't know, again, just where it occurred, no, sir.

Q. (By Mr. P. J. Gallagher). Do you know where the Cow Valley [494] break took place?

A. No, sir, not exactly. I have heard in a general way that that break is up somewhere in the Cow Hollow or East Cow Hollow area, but having not been there since it occurred I have no detailed information on it.

Q. Would that be in an area over which you had charge of the construction?

A. Near Cow Hollow, yes, sir.

(Testimony of Oscar G. Boden.)

Q. Do you know anything about the nature of that break? A. About the break?

Q. Yes, the nature, and what caused it?

A. No, sir. As a matter of fact, I didn't know there was a break there until I came up here.

Q. You realize, I think you have testified, that any substantial deposit of pervious material, either in the walls or in the bottom of the ditch, should be dug out and replaced with impervious material in order to have a good engineering job?

A. Yes, sir.

Q. Now, earlier in your direct examination, when you testified that if there had been any pervious structure or stratum in the sides or bottom of this ditch sufficient to carry water, that would have caused a break in the canal earlier than what occurred?

A. I am not sure that I said it would have caused a break. [495] I believe I said that if it had been pervious material of any amount it would have shown up in much less time than in the eleven or twelve years of operation.

Q. Now, that would all depend, would it not, on the amount of pervious material and the rapidity with which it absorbed water?

A. You might have, if a condition were just right, you might have a smaller pathway in pervious material that the water passed through that might cause as much damage as—Or, rather, pass through much as water through a larger area that was not quite so pervious, if I make myself clear.

(Testimony of Oscar G. Boden.)

Q. And it would also depend somewhat upon the very nature of the pervious material, wouldn't it, as to how rapidly it filled up with water?

A. Yes, sir.

Q. You think that any water that seeped into the west bank of the canal would, instead of going down or percolating out under the canal, just drain back into the canal?

A. Your Honor, instead of saying west bank,—I don't know about directions—If you would just say upper bank and lower bank.

Q. Upper bank.

A. I would think it would get back in the canal, yes, sir.

Q. Now, if it appears that there are seeps coming to the surface below the canal since this repair has been made in [496] sufficient amounts so that it can be easily discernible and flowing away in a small stream, where would you say, in your judgment, that water came from?

A. It might come from a number of different sources, that is possible.

Q. Well, what is the most logical place that you think it came from?

A. I don't know that I have an opinion on where for some seep spot there might be a source of water.

Q. Could it not very well have come from water impounded into the bank seeping into a stratum below the ditch and then coming to the surface?

A. In certain circumstances seep might appear

(Testimony of Oscar G. Boden.)

from water coming down through the bottom of the canal and showing up under the bank, yes, sir.

Q. And could it not come down from water imbedded in the bank of the canal if the stratum was porous enough to let the water soak through?

A. If the bank became saturated so that it had a lot of water in it, the chances are it would have a break show up before seepage down below.

Q. Well, it did break once. I am talking now about a condition that existed after the break and since the repair. I am asking you now if you have an opinion as to where that might flow from? [497]

A. Well, naturally, not being familiar with the conditions out here, I could hardly answer that question.

Q. Would it be fair to assume that that water might come from water that soaked into the upstream side of that bank and percolated down to a pervious structure and then found its way to the surface?

The Court: Counsel, I question if this examination is doing anybody any good. The witness is very positive about the fact that he does not know anything about the conditions. Obviously he can't give an opinion if he doesn't know the conditions.

Q. (By Mr. P. J. Gallagher): Now, Mr. Boden, if a pervious stratum intersected this canal as shown in Exhibit No. 80, would it not have been good engineering to determine the extent of that pervious stratum and its effect upon the flow of the ditch in order to determine whether it would be a danger or not?

(Testimony of Oscar G. Boden.)

A. I don't know that there was a pervious stratum that intersected this lower bank.

Q. Were you assuming that there was?

A. This is a hypothetical question, I understand,—

Q. Yes.

A. —that if the canal intersected a pervious stratum that extended to the lower bank or through it, obviously it would have to be in the natural ground and not in the built-up bank, [498] and if there were not some remedy done to build up that condition then in time some water would percolate through.

Q. And as that water percolated through it would have a natural tendency to weaken the structure, wouldn't it?

A. Not too necessarily. If it went through material that was very firm, like fissured rock, I think it would be a tremendously long time to ever weaken that formation.

Q. Now you talk about fissured rock. Now, you did not encounter any fissured rock in that—

A. Well, what I meant by fissured rock,—You say weakened formation—What I meant by that, that we could have rock in there—In some places you could have rock with open seams in it through which water would percolate until the rock had become weakened.

Q. So that the rapidity by which that water would finally percolate out and come to the surface

(Testimony of Oscar G. Boden.)

would depend entirely or to a large extent upon the type of material it was going through?

A. I would say not necessarily the type, but the openness of the material would determine whether it went slow or fast, if that answers you.

Mr. P. J. Gallagher: That is all.

Mr. Hess: That is all, Mr. Boden.

(Witness excused.) [499]

The Court: Now, I suggest that we are proceeding quite slowly. I had anticipated that this case would end up by tomorrow afternoon. I do not want to crowd you, I haven't crowded anybody so far, but I think that the case can be put on a little faster than it is going on. Both sides are going into some unnecessary repetition and some unnecessary detail. I am going to take into consideration holding night sessions someplace along in here if you do not get along as fast as I think we should. I would rather not hold any night sessions if we can help it, but I will take into consideration the progress we have made by this evening and then on tomorrow night if we haven't gotten anyplace and I think we should hold a night session we will hold one.

Mr. Hess: We will try to speed it up as much as we can. We realize this is an important case, and we have taken into consideration the time they took to put on their case. We are trying to put ours over the plate as fast as we can.

The Court: Yes. I am not going to hamper

you. I don't want to put in more hours if we can help it.

Mr. Veeder: Call George N. Carter. [500]

GEORGE N. CARTER

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Your name is George M. Carter?

A. George N.

(The witness was thereupon duly sworn.)

The Clerk: George N. Carter.

Direct Examination

By Mr. Veeder:

Q. Where do you live, Mr. Carter?

A. At Boise, Idaho.

Q. Would you state your age, please?

A. Sixty.

Q. Would you give a general statement of your education and background?

A. I graduated from the University of Nebraska in 1913 with Master of Science degree in Electrical Engineering.

Q. Since finishing school, would you give a statement of the character of work that you have performed and the positions which you have held?

A. I have engaged practically all of the time in irrigation or power work, plans, design and construction. Immediately after leaving school I came to Idaho and went to work for the Bureau of Recla-

(Testimony of George N. Carter.)

mation in construction of the Jackson Lake Dam in Wyoming, the Arrow Rock Dam in Idaho, and later on [501] surveys for the Hillcrest and Black Canyon units of the Boise Project. That work was completed in 1916. Thereafter I worked a short period of time for the U. S. Geological Survey on hydrographic work and ran a backwater curve up Snake River above the Swan Falls power dam. Beginning in 1917 I went to Twin Falls, Idaho, where I was Assistant to the General Manager on the operation of the Twin Falls South Side Project. It is a large project, 200,000 acres, with many canals. The main canal at the head has a carrying capacity of 3600 second-feet.

In 1918 I went to Jerome, Idaho, as assistant engineer on completion of construction of the Twin Falls North Side Land and Water Company Project. That was a project of 170,000 acres, involving large canals. My work was design and operation of some of the construction of completion of the canal system, all as required by the State Engineer of Idaho, in compliance with a contract for completion of the system under the Carey Act law.

In 1921 I came to Boise, Idaho, in the State Department of Reclamation, where I was Director of Water Resources for five years and Commissioner of Reclamation for five years. In that position the Department has charge and supervision of the distribution of all of the adjudicated streams of the state, adjudication of the water, and appointment of the water masters, and so forth. This Department

(Testimony of George N. Carter.)

is charged with the supervision and inspection of all dams by the State from [502] the standpoint of safety, in the interest of protection of life and property. Also, there were various decisions to be made in connection with the acceptance of Carey Act irrigation projects which were about completed, and many other miscellaneous duties that come to the State department.

In 1931 I opened an engineering office of my own in Boise, Idaho. For five years I engaged in irrigation work in connection with the rehabilitation of irrigation projects and some drainage work, and things of that nature.

In 1936, I went to Ogalalla, Nebraska, where I was engineer in charge of, first, the designs—or preliminary surveys and designs, and later the construction, of a large storage dam, in the relocation of some 34 miles of the Union Pacific Railroad and about 40 miles of Federal highways.

During that work, after the preliminary surveys and designs were coming fairly well along, I was sent to the Warner Hydraulic Laboratory at the Case School, of Cleveland, Ohio, where I spent three months as a resident inspector on hydraulic model testing of the various structures in connection with the dam and percolation and consolidation and permeability tests of the materials out of which the dam would be built, and so forth, and thereafter I came back to the site of the job and remained until construction was practically finished.

(Testimony of George N. Carter.)

In 1941 I went to work for the Bureau of Reclamation, [503] located at Boise, Idaho, first in charge of field investigations for the Idaho and Wyoming territory, and later, beginning with February of 1946, I was made the District Manager for the Central Snake River District for the Bureau of Reclamation. That district comprises the territory along Snake River from Bliss, Idaho, to Lewiston, Idaho, with all the tributary streams and areas in Idaho and Oregon. That is my present position, District Manager of the Bureau of Reclamation.

Q. Is the Owyhee Project under your supervision as district engineer? A. Yes, sir.

Q. Did you hold that position at the time that the North Canal broke? A. Yes, sir.

Q. Did you go to the point of the break at the time when the first breach in the canal occurred?

A. Yes, sir.

Q. How long did you remain there at that time?

A. I think I arrived there about five or six o'clock and stayed until about dark.

Q. That was on the same day?

A. That was on the same day, yes, sir.

Q. And did you leave the place of the break at that time? A. Yes, sir.

Q. When did you return to the area in which the break occurred? [504]

A. The day of the break was on a Sunday afternoon and I returned Friday morning, the following Friday.

Q. What brought you back then?

(Testimony of George N. Carter.)

A. I had been out of town in the meantime and got back to Boise Friday night, and the first news I heard was that the canal had broken again, and immediately in the morning I got up and went straight over there.

Q. How long did you remain at the place of the break at that time, when you returned?

A. I was there every day for probably a week. I know I lived with the job until the water was going safely by; how many days I do not exactly recall.

Q. Would you describe the bottom of the canal after the water had drained out from the second break?

A. I walked up into the canal through the break, and the first thing I noticed was that the bottom of the canal had cut down away below grade. That was due to the rush of the excessive velocities which took place when the canal broke.

Q. Well, could you describe the stratum—or would you describe the bottom of the canal as you saw it, the stratum, and whether there was solid material in there?

A. Getting into the canal through the breach, down clear to the bottom of the cut, there was a stratum of sandy material, as we call it, about that another stratum of rather firm bench material. I remember those two. They were both, as [505] near as I remember, below the bottom grade of the canal. Those disappeared as we might travel up the

(Testimony of George N. Carter.)

canal or down the canal. They were not visible except in the cut. That is, I did not see them.

Q. How far below the bottom of the canal did you observe these strata,—that is, the bottom as it was originally situated before the second break?

A. It has been about six or seven feet, because I could stand in the bottom and my eyes were a little below the level of the original grade of the canal where it had not been cut down.

Q. So it was six or seven feet below the——

A. Yes.

Q. Would you describe the activities that were undertaken in effecting the repair of the canal, particularly with reference to the work done on the bottom of the canal?

A. The bottom of the canal was brought back up to grade, that is, to the original level, after it had been cleaned out in through the cut, where the patch was to be keyed on, then the bottom of the canal was filled back up to its original level.

Q. Would you describe the extent that the material was cut out of the bottom of the canal?

A. As I recall, it was the maximum opposite the break and it was feathered out upstream some two or three hundred feet [506] and it feathered out downstream a shorter distance, probably seventy-five or a hundred feet.

Q. What was the character of the material that was removed from the bottom of the canal, the lowest stratum that was cut out?

A. Well, as I recall, there wasn't a great deal of

(Testimony of George N. Carter.)

material taken out of the bottom of the canal itself. There was some material removed along the inside of the lower bank.

Q. Was that a porous material?

A. It was a sort of a loblolly nature, I would call it, saturated material, clear down in the bottom.

Q. During the time of the repair did you observe the condition of the west or upper bank of the canal?

A. Yes, sir.

Q. Could you describe the type of soil and the stratum in that upper bank?

A. It was a rather firm material. It stood almost vertical. There had been some caving. It was what I would call a sound material.

Q. Now, when the canal had been repaired did you feel that—in the process of repairing the canal, rather, did you feel that it was essential for the protection of the structure to treat, to line the upper bank?

A. No, sir. I walked back and forth along there for several days and it was always under my observation and it never [507] occurred to me that it was necessary to do anything to the upper side of that canal.

Q. Have you observed this Plaintiffs' Exhibit No. 73? That is the one right back of you.

A. Yes, sir. I have seen all of them. Yes, sir, that one I have.

Q. Have you observed what has been referred to as a porous stratum in that upper bank?

A. Yes, sir.

(Testimony of George N. Carter.)

Q. In your opinion, would that porous stratum go through the bottom of the canal?

A. No, sir, I don't think it would go through the bottom.

Q. What relationship, in your opinion, then, were the porous stratum which you refer to in the bottom of the canal and this stratum here in Plaintiff's Exhibit 73?

A. I don't think they were related.

Q. Would you state the reasons for your opinion?

A. In examining the face of the cuts where the water broke through the canal, the bottom stratum, the most porous stratum of any of them, was disconnected, was not continuous; you could see it for a while and then it would disappear, and I don't believe there was any continuously connected uniform stratum across the section of that canal.

Q. When the canal was carrying a full head of water, could you state your opinion as to whether the upper bank would [508] become reservoired or saturated with water to the point that it would endanger the canal?

A. No, sir, I don't think it would. A canal can't break on the upper side.

Q. What do you think becomes of the water that enters that upper bank of the canal during the season of irrigation, when there is a full head in the North Canal?

A. Well, after the canal was filled to its normal operating stage, if there is porous stratum on the

(Testimony of George N. Carter.)

back side, the upper side, the water will gradually seep out through that porous stratum, taking whatever slope or hydraulic gradient is necessary to cause the water to flow through that particular type of soil. It will flow in that manner until its resistance—or I mean, not its resistance—until the force of gravity is finally entirely dissipated by the friction of the material, and then water will become static. Now, when that condition has been reached there may be some water—there is, of course, some water in the earth material back of the canal cut. When the canal is lowered, when the water is taken out, in the fall of the year, that water will flow back out into the canal, because water always follows the path of least resistance, and the path of least resistance is from the face, the open face, of the canal bank back down the slope into the canal prism which is empty.

Q. Have you been in the canal since the repair was made [509] during a time when there was no water in the canal? A. Yes, sir.

Q. Would you recite the condition of the bottom of the canal when water has been drained out?

A. Well, it was a normal condition and looks similar to the other parts of the canal, with the exception that I think there still remains there material which was placed in there for the backfilling, bringing it up to grade, material which was pushed off of the rim, the edge, of the cut above.

Q. What moisture, if any, did you find in the canal at that time?

(Testimony of George N. Carter.)

A. Very similar to any other portion of the canal bank,—no water or no drier.

Q. Was there water running in the canal after the irrigation season?

A. Not out of the cut, not out of the bank, no, sir.

Q. Was there any water running in there at all?

A. I didn't see any.

Q. Have you ever observed, in your work, canals similarly located on the base of a hill of this character?

A. Yes, sir.

Q. Have you observed earthen canals so situated?

A. Yes, a good many of them.

Q. Have those been in this general area?

A. Yes. [510]

Q. Was the upper bank of the canals lined?

A. Nowhere to my knowledge.

Q. In your opinion, would it have been a good engineering practice to seal the upper bank of the canal?

A. I don't think it would have accomplished anything advantageous and would be of no value.

Q. Would it have lent security to the canal?

A. I don't believe so.

Q. Would you describe the character of construction of the North Canal at the point where the breach occurred? In other words, is that a cut or a fill?

A. It is in a cut, natural ground.

Q. What is considered good engineering practice when a canal is so situated? Do you cut out an area and put in a core bank?

A. Yes, sir.

(Testimony of George N. Carter.)

Q. Do you put in a trench in the natural earth which constitutes the lower bank of the canal?

A. No, I never have seen that done. I never have recommended it nor done it myself.

Q. What is the reason for that statement?

A. The canal location being all in an excavation is in material which will hold the canal. We don't dig down 10 feet or 5 feet below the ground surface to see if there is pervious strata in there. If there is it is exposed in the [511] excavation when the canal is built.

Q. When the excavation reveals that characteristic, what is good engineering practice?

A. If any pervious stratum is encountered within the excavation of the canal prism, why, of course, some method or means would be taken to make it tight.

Q. And what do you consider to be a good practice to make the canal tight?

A. Well, there are two ways of doing it that I have in mind, both used considerably. One is a concrete lining and the other is earth lining. The earth lining may be protected with a layer of gravel to hold it in place.

Q. May I refer to Plaintiffs' Exhibit 80? You will notice that a stratum designated as porous enters the bottom of the canal, apparently with no lining between the water and that pervious stratum. Now, would you state what would have, in your opinion, transpired had water been released into the canal with that situation existing?

A. Well, that being a pervious stratum, compara-

(Testimony of George N. Carter.)

tively open and to some extent—I don't know, to that scale, what depth is represented there, but at any rate there would have been prompt seepage and percolation underneath that bank in considerable quantity showing up on the outside.

Q. How long do you think it would have taken and what do you think the ultimate result would have been had that condition [512] existed for any period of time?

A. Well, it would either have resulted in a relatively large flow appearing at the outside toe of the slope if this were open gravel, or if the flow, if the velocities were high enough, it might have started carrying out materials and have undermined the bank and led it down and it would break. Or one other thing could have resulted: If there were enough more resistance to the flow through the pervious stratum than upward, then water might have, by percolation upward and some capillary action, saturated the lower toe of that slope and caused it to slough.

Q. How long do you think that would take—assuming that action that you have described, how long would it take for a canal to breach under those circumstances?

A. Well, it could be any period of time, say from very short, a month, up to years, owing to the cross-section area of the pervious stratum and the percolation that went through it. It could be 'most anything. We have had percolation studies where the percolation through pervious material was only a

(Testimony of George N. Carter.)

hundred feet, seventy-five to a hundred feet, a year.

Q. It would depend upon the porosity of that stratum, is that correct?

A. Yes, and the cross-sectional area.

Q. If it were an extremely porous stratum how soon would you expect a canal to breach? [513]

A. Well, if it was an extremely porous stratum you could expect it to come through there in a day or within a few hours. It is all a matter of degree.

Q. It wouldn't take long if it were highly pervious?

A. No, sir.

Q. You don't think it would take eleven years?

A. That would mean a percolation rate very slow. If that were eleven years,—110 feet, it would take eleven years at 10 feet a year.

Q. Have you an opinion as to what caused the canal to break on July 14, 1948?

A. Yes, sir.

Q. 1946, I beg your pardon.

A. Yes, sir.

Q. What condition did you take into consideration in reaching that opinion?

A. The character of the formation upon which the canal was built, principally.

Q. And would you describe the character of the foundation upon which the canal was built?

A. Within the canal prism and along the bottom and the lower bank there is a stratum of rather firm, consolidated sand and some gravel, but the material is consolidated, it has stability. Further down there is another stratum of sand, to the naked eye of rather uniform size particles and does not have the [514] same degree of consolidation or cementation. What I think happens—

(Testimony of George N. Carter.)

Q. Would you state the depth of that stratum that you last described beneath the bottom of the canal?

A. About four feet, as I recall it.

Q. And now would you continue with your statement as to the premise upon which your opinion is, and your opinion as to the cause of the break?

A. What I believe happened is that water seeping down through the bottom of the canal over a period of time, whether long or short I don't know, but eventually enough water found its way into this bottom stratum to saturate it, cause it to lose its stability, its ability to withstand weight or pressure, probably getting into almost a fluid state, in which condition it gave away and the canal bank went with it.

Q. What would you consider to be good practice to guard against what you have just described? Is there any means that could have revealed that to the men in charge of this canal—the men in charge of the construction of the canal?

A. No, it is not customary in ordinary canal construction to go beneath the excavation line just to see what is down there. The canal has been designed to lay into the country far enough that it will be in original ground, so that nothing is exposed during the course of the excavation; the material appears to be reasonably tight and ordinary material which will carry [515] water without undue percolation, and that is the way it is left.

Q. Prior to the time of the break did you

(Testimony of George N. Carter.)

observe the condition of the bank of the canal?

A. At this point?

Q. At this point?

A. Yes, sir. I have been by there a few times.

Q. What did you observe at that point and in that general area?

A. Nothing at that point. It was just the normal canal section, appeared to be all right.

Q. Did you observe indications of seepage?

A. No, sir.

Q. Since the break have you observed any change in the appearance or condition of the canal bank?

A. No, it looks very similar now, the way it did before.

Q. Have you observed seepage down the bank to the toe of the canal and down to the farmer's ditch which has been described in the testimony?

A. No, sir.

Q. Did your answer in responding to that last inquiry relate to what has been referred to as the Ben Shaw place?

A. Yes, sir.

Q. The bank above the Ben Shaw place?

A. Yes, sir, the area immediately adjoining the break. [516]

Q. Would you state your observation of the point where the vegetation commences on the Ben Shaw place?

A. It is along the line of the service ditch, the farm lateral.

Q. The farmer's ditch?

A. Yes.

(Testimony of George N. Carter.)

Q. Was there anything above that that would indicate a seepage? A. No, sir.

Q. You stated your opinion as to what caused the first break in the canal. What is your opinion as to what caused the second break?

A. I think the same saturated condition existed in that bank at the point of the second break as existed at the point of the first break.

Q. Was it the same stratum to which you have referred beneath the bottom of the canal?

A. Not connected, no, sir.

Q. It was not connected. Was it at approximately the same level as the other stratum?

A. You are referring now to the other stratum,—you mean the one which caused the first break?

Q. Which caused the first break.

A. I was not in the cut at the first break. When I was there it was full of water and I did not see it exposed before it [517] was repaired.

Q. Would you state your opinion as to what caused the second break?

A. Well, the same condition existing as caused the first break, this underlying stratum down as I saw it in the second break. Some 7 feet below the bottom of the canal was a saturated loblolly unable to resist the bank load and the water pressure.

Q. Would you describe the canal along the gully, coulee, north of the break, and whether there are structures under the canal at that point?

(Testimony of George N. Carter.)

A. A few hundred feet down the canal from the site of the break there is a gulch or coulee coming down the slope. The canal goes back around and out a point to hold on grade. It has evidently seeped in that locality, because the vegetation there is indicative of seepage: Wet ground, willow growth, tules, and so forth. I don't think that there is a structure under the canal at that point.

Q. Is there a structure further down?

A. On down in the next gulch down the canal there is a cross-drainage structure.

Q. What is the object of that structure?

A. To take the surface waters which accumulate above the canal bank and conduct them under the canal without destroying the canal itself. [518]

Q. Of what, in your opinion, is a seep indicative when it appears well down below the toe of the canal?

A. It demonstrated to me a healthier, safer condition in your canal bank than if you do not have seepage. That is, if you know where there is seepage, clear water running below, that you have drainage under that leakage section of the canal bank, that hydrostatic pressures are not being built up within the bank, bringing up the line of saturation and percolation so that eventually there is a blowout and a slough and you lose your canal bank.

Q. Not a sign of danger to your canal bank?

A. To me it is a sign of safety when you have clear water drainage underneath the canal bank.

(Testimony of George N. Carter.)

The Court: Well, it didn't work out in this instance, did it?

A. Well, there are no indications at this site of any seepage material that prolonged up the canal bank or down the canal bank.

The Court: There is clear water running out up above, a condition that has continued for a long time.

A. Yes, sir, and to me that is indication of safety.

The Court: Well, but the bank did break there.

A. Yes, broke here, where, so far as I can discern from what I have seen afterwards, there was no seepage. In other words, the water was trapped and impounded in there and that filled [519] up the saturation and caused the soil to lose its stability and ability to resist force.

The Court: Well, I don't just exactly see the logic of your position and, if you can, explain it to me. Here there is a seep up above that you don't know the source of, and there is testimony as to the seep around and above the particular piece shown in 82 here, and you attribute one to the farmer's lateral and you don't know where the other came from, and still you say that is a healthy sign and still you have a break. Now, don't you think that there is some connection? Don't you think that perhaps you might have paid some attention to that?

A. I think if there might have been a well-developed seepage at the site of the break which had been known for several years that the break

(Testimony of George N. Carter.)

might have occurred at that point. In building dams, somewhere along the lower third of the base you put in systems of drains—I worked on a very large dam where we had a complete drainage system about the downstream third, and the purpose of that was to take any water out freely, any water that found its way through the upstream portion of the dam.

Now, I know of another dam over in Idaho that did not have drainage, free drainage, but it did have leakage from the upper side, and that dam finally saturated on the downstream side and we became worried about it and we went [520] in there and put in drainage to assist that water after it got part way through the embankment, but we did not get enough of them in and eventually the dam went out, and that was a dam that did not have drainage.

I know of another dam over in Idaho that has a terrific amount of drainage through the foundation and that dam is perfectly safe.

The Court: In other words, you will not accept testimony here that there was any seepage below?

A. There could not be any material amount, because there's no indications of it. There is no willow growth or any wet ground such as is seen up there in that gulch. That is what I see as an indication of safety, willow growth and cattails, and such as that.

The Court: There were some willows above the farmer's ditch.

A. Just a very little spot.

(Testimony of George N. Carter.)

The Court: And you do not accept the testimony that there were places—in this testimony here—where this wash was where they sank a Caterpillar when the farmer was trying to plow?

A. Well, I didn't see it, but there was testimony that the cat bogged down. I believe it bogged down.

The Court: Don't you think that indicates some seepage right in front of your break? [521]

A. That was below the farmer's ditch and that could have come from irrigation or seepage out of the farmer's ditch.

The Court: In other words, you disregard anything that does not fit in with your theory?

A. Well, I have my theory, what there was of theory and the rest facts, all developed in my mind before I heard of any of these things, and that doesn't change my opinion.

The Court: In other words, you would roll a rock down a mountain if it was too high to suit your theory?

A. No, it just won't square with the conditions as I have seen them on the ground. I think a canal bank in which some water, a small amount, is finding its way into the bank and not finding its way out on the lower side, then is when a dangerous condition is set up which may lead to a break.

The Court: And you don't think that these structures on the hillside were of that type?

A. No, sir.

The Court: All right, go ahead.

Q. (By Mr. Veeder): Are you acquainted with

(Testimony of George N. Carter.)

the seep area on the Hust place, which is directly south of the canal, from the area marked on Plaintiffs' Exhibit 82? There is a seep area there, is there not? A. Yes, sir.

Q. Would you describe that area, as to what is transpiring there now and the character of the growth? [522]

A. When I examined it there was a small amount of water running out of a rather irregular place in the ground, maybe larger than this table, and growth around it—I think it is hayfield or pasture—As I recall, there is nothing but hay growth around it.

Q. Is that the condition existing below the farmer's ditch?

A. Yes, sir, it is down the irrigated field.

Q. What is the condition of the canal above the farmer's ditch? Is there seep area there?

A. Not that I ever saw.

Q. Have you ever observed any seep condition on the bank of the canal above the Hust place?

A. No, sir.

Mr. Veeder: That is all. You may cross-examine.

Cross-Examination

By Mr. Lytle:

Q. You state that the second break was caused from the same reasons that the first break was caused, which was the result of saturation of materials in the bank. Couldn't that have been de-

(Testimony of George N. Carter.)

terminated by testing the materials before repair following the first break?

A. Yes, sir, it could have been.

Q. And it was not?

A. But it was not, that is right.

Q. Now, where did you first look for seep indications on the [523] Shaw place?

A. Well, I wasn't looking for seepage in particular, but during the period of repair of the second break I walked all over that place half a dozen times or more, and I was watching the wash particularly, the gash that was cut in the ground by the heavy flow of water. I was looking for drainage, for seepage, coming out anywhere in that gash clear down the hill, and there was a very small amount and I watched that from day to day. I had a little measuring device there so I could tell how much was coming out, comparatively, and it was so small that during the hot part of the day when the wind was blowing there was no flow over this little notch that I had built. In the cool of the evening or in the early morning there was very small flow over that notch. Now, that was all the seepage I could find in that field.

Q. And that was down in the wash disclosed in the Plaintiffs' Exhibit 69?

A. Yes, sir. In 75, down about midway from the upper end of it to where it stops at the bottom of the picture.

Q. And at that time there was no water in the canal? A. That is right.

Q. Now, this farmer's ditch on the Shaw place

(Testimony of George N. Carter.)

is just a short distance below the toe of the outer bank of the canal? A. That is right.

Q. About how far, would you say, Mr. Carter?

A. Oh, it is variable. In some places——

Q. I appreciate you did not measure it.

A. What is it?

Q. I say I appreciate you probably didn't measure it, but give us an estimate.

A. I would say in some places it was 5 feet and in other places it was maybe 20 feet away. It didn't exactly follow the toe of the bank.

Q. Now, if it appears that it was testified in this case that at a time when the head was turned off, when this lateral was closed and no water coming from the canal into the ditch, there were at places in this farmer's ditch live or flowing water, where would you say that came from?

A. Well, I wouldn't know. Let me see if I understand you. No water, there hasn't been any irrigation in the farmer's ditch for some little time?

Q. Yes.

A. Water is out from the main canal?

Q. No, water is in the main canal.

A. Oh, water is in the main canal.

Q. But the headgate in this ditch is closed, so it is receiving no water from the regular source of supply, and there is at places in this ditch live or flowing water. Where would you say that came from?

A. Well, the logical conclusion would be that it was coming [525] from the canal bank—can't

(Testimony of George N. Carter.)

attribute it to any other source, under those conditions that you describe.

Q. Yes, and if that continued over a period of time it would indicate a continuous seepage from the canal?

A. Yes, sir, under the conditions you have stated, it would.

Q. Now, the testimony in this case discloses that the area included in Plaintiffs' Exhibit No. 82 was in such seepy condition, such an excess of moisture, that the hay could not be harvested in the usual means, that they had to carry the hay off by forks rather than by machine or by horse power, that water would gather in the horse tracks or in the wheel tracks of the wagon and in the tracks made by the tractor. That would indicate a rather serious seep condition, would it not?

A. Yes, sir, it would indicate that there was a lot of moisture in that soil if that happened.

Q. That would indicate a condition much more dangerous than the condition where the water is coming out in a free flow and clear water?

A. Unless that condition were some distance away from the canal. If it were some distance away from the canal I would still think it would be safe.

Q. Will you look at Exhibit No. 82.

A. Which is Exhibit No. 82? I don't see a number.

Mr. P. J. Gallagher: That one right there. [526]

A. This one right here (indicating)?

Q. (By Mr. Lytle): There is a scale on that

(Testimony of George N. Carter.)

exhibit which says what the scale is.

A. Fifty feet, one inch.

Q. Well, the distance indicated there of the seeped area of the farmland would disclose it to be about how far from the canal?

A. Is this the outline of the seeped area (indicating)?

Q. Yes, sir.

A. Well, I estimate that is about 75 feet, in general, along there.

Q. And isn't that close enough that a seepage of that extent would indicate a rather serious condition?

A. No, sir, I don't think so, that far away.

Q. You think that would give the farmer reason to believe that he was in a zone of complete safety?

A. So far as the canal was concerned, yes.

Q. Yes. And if the seep from the main canal there was in sufficient quantity that it furnished flowing water for the farmer's ditch, wouldn't that represent a much more serious situation than the situation of the free flow that you describe?

A. Yes, that is seepage closer to the toe of the canal bank, but on either side of this break there has never been any sloughing of the bank. There is no indication that the line [527] of saturation is creeping up the embankment, and so long as the line of saturation does not creep up above the original ground, the normal ground level, there isn't much danger of sloughing.

Q. Or breaking?

(Testimony of George N. Carter.)

A. No, no break at that point.

Q. But it did.

A. It broke underneath, I think.

Q. Now, when you examined the bottom of the ditch, or, rather, the area below the ditch, below the bottom of the ditch, after the break, you found, I believe, a type of sandstone or sandy formation?

A. Yes, sir.

Q. Quite consolidated. Now, did that connect?

A. Well, there were two in there. The lower one, the least consolidated, was down at least some foot below the bottom of the canal.

Q. Yes.

A. I mean 7 feet below the bottom of the canal, a foot below the level of my eyes; that is where it was.

Q. And what was the depth of the other stratum below the bottom of the canal?

A. That laid on top of this lesser consolidated stratum.

Q. That is, the second stratum from the bottom was the most consolidated? [528]

A. Yes.

Q. Now, was that on a flat or an inclined plane?

A. As I remember, it had some inclination, some dip.

Q. That inclination was toward the valley?

A. Yes.

Q. Now, seepage from the canal following that stratum down toward the farmlands might have a tendency to appear at a greater distance from the canal than it might otherwise?

A. Yes, sir.

(Testimony of George N. Carter.)

Q. Which would account for that seepage not showing up on the uphill side or west of the marked portion on Exhibit 82?

A. Yes, sir, I think that would be true.

Q. Then it is your judgment that the first break came in the bottom of the canal?

A. Below the bottom of the canal.

Q. Yes.

A. I think it gave way below the bottom.

Q. Yes. In other words, this loblolly underneath the canal sloughed out and the whole thing gave way? A. Yes.

Q. And the whole thing was resting on a rather highly consolidated sandstone on an inclined plane downward toward the valley? A. Yes, sir.

Q. Was there anything about the terrain, the surrounding [529] country, that might have indicated that condition to exist at that point?

A. No, not that I am aware of.

Q. I call your attention to Plaintiffs' Exhibit No. 70. Did you observe the condition shown in that picture in the area reasonably close to the area of the break?

A. That is the gulch down the canal from the break, where there is vegetation?

Q. Yes; I am talking about the upper hillside and the out-croppings.

A. No, sir, I didn't pay any attention to those or attempt to connect them up with what happened within the canal prism.

Q. You say that after the second break the bottom of the canal was brought up to normal grade?

(Testimony of George N. Carter.)

A. Yes, sir.

Q. Do you know whether that was true of the repair following the first break?

A. No, sir, I don't know. I wasn't there.

Q. You weren't there, but have you checked any records or files to inform you on that subject?

A. No, I have not.

Q. You did not?

A. I did not inquire.

Q. Would you say the west or mountainside bank of that canal at the point of the break and as shown in Plaintiffs' Exhibits [530] 73, 74 and 77—

A. Pardon me, if you had a question I was concentrating on the exhibits and I did not get the question.

Q. Well, Mr. Carter, I am not so sure I completed the question. Would you say that the soil on the mountain side or up side bank of the canal as shown in Plaintiffs' Exhibits 73, 74 and 77 disclosed strata, for the full height that your water level would reach in the canal, of material impervious to water?

A. Is the upstream bank of the canal impervious out to the water line? Is that your question? Or from the water line on down?

Q. Down. I brought it up, but we will take it down.

A. I think there is some impervious material below the water line, sure there is.

Q. Now, would you say there is some pervious material below the water line and above the bottom of the canal?

(Testimony of George N. Carter.)

A. Yes, there are some pervious materials in there also.

Q. Now, were any tests made to determine whether the part of the bank that was permeable extended below the bottom of the canal?

A. Not that I know of.

Q. If it did extend below the bottom of the canal, then water seeping in and percolating into the mountain side of the canal could seep down below the bottom of the ditch, could it [531] not?

A. Yes, sir, it could go down if the pervious stratum continued.

Q. Would you say it would be good engineering practice to build a canal through an area the banks of which disclosed it to be subject to percolation without determining whether or not that area extended below the bottom of the canal?

A. Why, I think our reconstruction there has demonstrated it, because the entire area below now is hard and dry.

Q. Just a minute. Now, when you made the repair following the second break how deep did you go with the trench or key slot in which was left the core?

A. If I recall, it started about on the bottom elevation of the break and continued——

Q. Pardon me, I didn't get that. The bottom elevation of the what?

A. Of the canal at break, after it was broken—and extended down the canal until we reached the end of that poor material.

(Testimony of George N. Carter.)

Q. You started your core at the bottom of the break in which you stood when you went up there, and the bottom of the canal was 6 or 7 feet higher than you?

A. I am not too certain of the elevation at which that stuff was dug out, but it was somewhere of that elevation.

Q. So at that point the key slot for your core was down into this consolidated sand? [532]

A. Yes, sir. In other words, what we were doing was to remove all of the saturated weak material and after we had done that we backfilled it with good material.

Q. Yes; and also what you were trying to do with that core was to cut off seepage in that lower area, wasn't it?

A. Yes, sir.

Q. And that would account for the fact that the area below is no longer seeped, if it is in fact no longer seeped?

A. Yes, sir, provided the water seeping into the upstream bank did not go below the bottom of this core trench and then go on down the bank. Whether it does or not I don't know.

Q. So that your core now is down there at 6 to 7 feet below the bottom of the canal?

A. Yes, sir.

Mr. Lytle: That is all.

Redirect Examination

By Mr. Veeder:

Q. Mr. Carter, would you explain the phenomena

(Testimony of George N. Carter.)

of seepage in as far as the manner that it relates to the particular point where the water surfaces? Does it indicate that the seepage is from the point directly opposite from where the seep arises?

A. No, sir, it may be some distance away laterally. We have searched for those seeps and we do not find them directly opposite their point of emergence from the ground.

Q. In your experience as an engineer and observing large [533] projects, have you ever encountered what they call drainage ditches?

A. Yes, sir.

Q. What is the object of those drainage ditches?

A. To intercept the ground water table, draw it down into the rainage ditch and lead it away to some river or some other channel.

Q. It intercepts, in other words, ground water which would not come to the surface for some distance? A. Yes, sir.

Q. Now, the farmer's ditch is located below the toe of the canal, is it not? A. Yes, sir.

Q. Could it not be that that ditch would intercept seepage coming down the canal and coming down from the canal from any spot from where the canal might be seeping and act, in effect, as a drainage ditch itself? A. Yes, sir, that is true.

Q. Would that not explain the possibility of live water in the farmer's ditch?

A. Yes, sir, that explains it exactly.

Q. What is the effect of seepage on crops?

A. Too much seepage, too much ground water,

(Testimony of George N. Carter.)

limits the growth and eventually kills the growth of ordinary marketable crops.

Q. What is the effect of heavy seepage which would cause a [534] Caterpillar tractor to become stuck?

A. Well, if that would continue for any long period of time there would be willow and tule growth in there.

Q. Well, what would it do to a crop of clover that was growing in there?

A. I would think it would yellow it and kill it.

Q. Kill it out? A. Yes, sir.

Q. What would be the effect on the harvesting of a crop of so bad an area?

A. Well, there wouldn't be any crop to harvest if it proceeded for any length of time.

Q. It would kill out the crop? A. Yes, sir.

Q. What does it reveal, in fact, if there was in fact a crop taken off of this area, Plaintiffs' Exhibit 82, which you saw?

A. Well, it would indicate to me that very recently there has been water on the surface; maybe it had been irrigated, or if this were seepage it had come in very recently and it hadn't killed the alfalfa crop.

Q. It hadn't been prolonged seepage at that point?

A. Alfalfa will not live in waterlogged land.

Q. Is that true with respect to clover or other crops?

(Testimony of George N. Carter.)

A. So far as I know, all crops will wither and wilt if there [535] is too much water on it.

Q. Have you investigated on the Ben Shaw place, and particularly the area on Plaintiffs' Exhibit 82? Have you observed the type soil on that land?

A. Yes, sir.

Q. Have you observed the stratum directly beneath it?

A. Yes, sir.

Q. Would you describe that stratum?

A. It is—As exposed in the wash it is what I call hardpan.

Q. Would you characterize hardpan, so far its imperviousness is concerned?

A. It is impervious, very impervious, to the penetration of water.

Q. Suppose that an area underlain with hardpan were irrigated, explain what would happen to the water that was spread out on the land.

A. If the percolation was downward all of that water would be stopped by the layer of hardpan, and then its only source of movement is to flow downward on the contact along the hardpan.

Q. It stays on top of the hardpan?

A. Yes. We have that trouble where——

Mr. P. J. Gallagher: If the Court please, this is not redirect. We object to it on that ground. Nothing about the Ben Shaw crops. [536]

Mr. Veeder: If your Honor please, counsel has covered the matter with respect to the crops and with respect to the seeped area, and inquiry was

(Testimony of George N. Carter.)

made as to the situation on the seeped portion of Plaintiffs' Exhibit 82.

The Court: All right, don't take too much time. Go ahead.

Q. (By Mr. Veeder): Would you explain again the effect of irrigation or seepage from the farmer's ditch upon the topsoil in the area appearing on Plaintiffs' Exhibit 82?

A. As the water is applied to the surface of the land its percolation is naturally downwards and will continue downward so long as it is not intercepted. In a condition existing as exposed on the Ben Shaw place the percolation downward will be but a short distance when it is stopped by this layer of hardpan; then the only source of disposal of the water is either flowing downward, downhill, along the hardpan on the contact, or if it can't escape that way it will rise up and stand on the surface. In this case the surface slope is too steep for the water to stand. We have that trouble in irrigation of relatively level lands. Where there is hardpan within a foot, or too close to the surface, the water will not penetrate and we have trouble with the land.

Q. Have you observed recently whether there is a crop on that land at the present time?

A. There is some crop remaining from other years. There is [537] alfalfa to the south, and the rest of it has scattering spots of clover, and the rest of it is grown up to cheat grass.

Q. What is the condition of the land now so far as seepage is concerned?

(Testimony of George N. Carter.)

A. It is all dry and hard every place that I looked.

Q. Did you investigate the area?

A. I went, yes, pretty well down to the end of the wash and circled back on around to the north of the fill.

Q. Would you please refer to Plaintiffs' Exhibits 73 and 77 and observe the formation immediately to the right of the figure standing with the rod.

A. On 77, you mean?

Q. Yes, that one.

A. Now, what is the question, please?

Q. Would you explain the apparent loose earth right there in the bottom of the canal which extends upward along the upper bank?

A. The material now present in the bottom of the canal is largely material that was 'dozed off of the hill up above here. That was 'dozed off and spread along the bottom and leveled off to a certain extent, but not completely. Some of it was left lying up against this slope along here, and what I think this broken material on top is is other material which has been scaled and sloughed off on this slope along here (indicating). [538]

Q. What, in your opinion, is the source of the greater part of that filled-up area to which you refer?

A. It was pushed off of the top of the hill and into the canal purposely.

Q. Does the same situation exist with respect

(Testimony of George N. Carter.)

to the comparable area as appearing on Exhibit 73?

A. Yes, sir, it is the same condition.

Q. How far was that work carried on up the canal, that drifting of material off the upper bank?

A. From the point of the break it was drifted off three or four hundred feet upstream for the purpose of filling the bottom of the canal, and then from there on up a considerable distance more silt and fine soil was 'dozed off into the canal for the purpose of silting it, tightening it up.

Mr. Veeder: That is all, thank you, Mr. Carter.

Recross-Examination

By Mr. Lytle:

Q. Does that drift of soil as shown in the bottom of Exhibits 73 and 77 show there in the condition that it was when it was purposely pushed down over the mountain?

A. No, it has a little different appearance now. It has been worked by water and I think there has been some caving along there, too.

Q. Yes.

A. It was left in a smoother appearing condition than that. [539]

Q. Just smoothed. It was smoothed out quite considerably, so as to silt the bottom of the canal and the lower side?

A. Yes, to silt and to fill, raise it up to original grade.

Q. Yes; so that, as a matter of fact, most of that is slough from the bank, is it not?

A. There was some left lying up against the

(Testimony of George N. Carter.)

slope, and there is some slough on top of it, I think, in its current condition.

Q. And that same condition is disclosed of the sloughing in Exhibit 71? A. Yes, sir.

Q. As evidenced by those sort of halfmoons along that upper bank?

A. Those are sloughs in those places along there, yes, sir.

Q. And, regardless of the topsoil and hardpan, when you looked at that crop on the Shaw place it was showing yellow in color, was it not?

A. Yes, from drouth, I think.

Q. And it shows yellow in color from seep as well? A. Not this summer, no.

Q. I am asking if the same color is not disclosed by seep?

A. No, it doesn't have exactly the same appearance.

Q. I am asking about the color, Mr. Carter.

A. That is it, the color. An alfalfa plant which is yellowing from lack of water does not have the same appearance as one that is yellowing from too much water. [540]

Q. You mean the shade of yellow?

A. Yes.

Q. Mr. Carter, what is the size of this farmer's ditch along the head of that piece of ground?

A. Oh, it is a foot and a half or maybe two feet on the bottom, variable in width, the bank a foot to a foot and a half high, enough to carry, I would estimate, maybe a second-foot of water.

(Testimony of George N. Carter.)

Q. Then when it was not receiving water through the headgate out of the canal but was receiving water through seepage from above it, it was acting as a sort of a drainage canal to carry part of that seep water away from this ground, wasn't it?

A. It could do that, yes, sir.

Q. Well, I understood you to have it doing that when you were being examined by Mr. Veeder.

A. Yes; yes, that is what I mean.

Q. So that in addition to seeping the ground below it is also carrying away part of that seepage water?

A. You mean carrying it laterally and longitudinally along the canal?

Q. Yes.

A. Yes, sir, to the extent of the flow.

Mr. Lytle: That is all. [541]

Further Redirect Examination

By Mr. Veeder:

Q. May I have just one more question? Does that sloughing—What is that sloughing indicative of? Does it indicate a danger to the canal?

A. No, it is not a danger. If carried to a sufficient degree it will decrease the capacity.

Mr. Veeder: That is all.

The Court: That is all.

(Witness excused.)

The Court: The Court will recess.

(Short recess.)

Mr. Hess: Call Mr. Grant Gordon. [542]

GRANT GORDON

was thereupon produced as a witness in behalf of the defendant herein and, having been first duly sworn, was examined and testified as follows:

The Clerk: Grant Gordon.

Direct Examination

By Mr. Hess:

Q. Your name is Grant Gordon?

A. That is correct.

Q. Where do you reside, Mr. Gordon?

A. I live in Boise, Idaho.

Q. What is your age? A. Forty-two.

Q. And will you please give your educational qualifications?

A. I graduated from the College of Idaho in 1926 and took some postgraduate work at Stanford University in 1930.

Q. What degree or degrees did you hold?

A. I took the degree of Bachelor of Science from the College of Idaho and have full graduate standing in the Stanford School of Engineering.

Q. And when did you take your degrees, in engineering?

A. I took some post-graduate work in Stanford in 1930.

Q. And what work have you had since that time in the field as an engineer?

A. Well, since 1927 I have been employed by the Bureau of Reclamation continuously, except for the approximately six [543] years I was in the

(Testimony of Grant Gordon.)

Army. I started out in the Boise Project on topography and service in connection with the location and construction of canals on the Black Canyon Project in the fall of 1927. In the winter of 1927 I worked in the Boise office, helping to compute the excavation quantities and make paper locations of the canals that were built on the Black Canyon.

In the spring of 1928 I was again in the field on canal location on the Black Canyon Project.

In the summer of 1928 I served as instrument man on the location of the Deadwood Road, which is the road leading into the Deadwood Dam over in Idaho.

In the fall of '28 I was again on the canal location on the Black Canyon Project, in charge of the party. In the winter of '28, again in the Boise office, working up the notes that had been taken on the Deadwood Road and preparing plans and specifications for that road construction.

In the fall and winter of 1928 and the spring of 1929 I was in charge of some drainage investigations on the Boise Project and supervised the operation of two draglines in the construction of drains. In the summer of 1929 I was inspector and engineer in charge of the construction of the Deadwood Road, some nine miles of Forest Service type highway construction down the Deadwood River. In the fall of 1929 I went on the actual construction of the Deadwood Dam as an inspector. [544]

That winter, the winter of '29 and '30, I attended a quarter at Stanford University. In the spring of 1930 I again went to the Deadwood Dam and was inspector on one shift during the entire con-

(Testimony of Grant Gordon.)

struction of the dam, which was completed in the fall of 1930.

I was transferred then to the Owyhee Dam and was a shift inspector on the construction of the Owyhee Dam from a point about at the river level until the dam was nearly completed. I served on that job for about ten months. Was transferred for a short time to the Sheep Valley Dam, near North Power, Oregon; was there about two months, at which time I supervised the development and testing of the aggregate pits, the detailing and bending of the reinforcing steel for an Anderson-type dam.

In the late fall of 1931 I was transferred from Sheep Valley to the Cle Elum Dam and was there until the fall of 1933. At Cle Elum Dam I was in charge of the earth and concrete aggregate laboratory and I performed all the tests on earth and earth fill which went into the dam and the concrete materials, supervised the operation of the concrete construction plant, and did some of the inspecting on the placing of the fill and the grouting in of the outlet conduit.

In the fall of 1933, as the Cle Elum Dam was completed, I was transferred to Coulee Dam in Washington, served there for seven years. The first two years I was Chief [545] Inspector and I had charge of the construction of the camp, which included the buildings, the warehouses, the administration buildings, the schoolhouse, the water and sewer systems and streets and access roads and highways, the sinking of two piers for the founda-

(Testimony of Grant Gordon.)

tion for the bridge across the Columbia River, the search for a development of concrete aggregate sources for the dam, the diamond drilling, the foundation exploration for the foundation for the dam, as well as supervision of the contract for the preliminary excavation on the dam.

When the main contract for the dam was let I was made responsible for the preparation and treatment of the foundation on which the dam set and had charge of geological investigations on the entire Columbia River-Coastal Project. This included the supervision of some five diamond drill rigs. We sunk exploration shafts and drove exploration tunnels on the South Coulee damsite, we searched for and developed the aggregate sources and supplies for both the North and South Coulee dam. All this time I was responsible for actual foundation preparation operations on the main dam. The work came under the treatment of various series slides. I maintained and supervised the operation of a laboratory which was testing and sampling earth materials, concrete aggregate materials, pozzuolanic materials.

I filled that position until I joined the Army in 1940. I entered the Army in September, 1940, was in it nearly six years.

Q. Now, what department did you go into in the Army?

A. I was commissioned in the Construction Division of the Quartermaster Corps first, and in 1942 was transferred to the Corps of Engineers.

(Testimony of Grant Gordon.)

Q. All right; and what was the type of the work performed by you or supervised by you while you were in the Army with the Engineers?

A. I was in charge of the construction of the 41st Division Cantonment at Fort Lewis and some other buildings there, a sum total of some five thousand buildings, together with about 500 miles of paved highways, water and sewer installations.

In the fall of 1942 I was transferred to Great Falls, Montana, as Area Engineer for the State of Montana. There I had charge of the completion of some five major airports and some lesser installations. The job there involved the investigation and design and construction of airport runways, hangars, heating plants.

In the spring of 1943 I was transferred to the Olympic Peninsula as Area Engineer in that vicinity. There I had charge of the design and construction of several major airports, some six seacoast batteries, running up to 16-inch, some 40 or 50 miles of primary highway, fifteen or sixteen [547] cantonments, several hundred aircraft warning stations, and other installations for the control of seacoast defense, as well as a large number of secret installations.

From Great Falls in 1943 I was transferred to the Seattle office, to the District Engineer's office in Seattle. For eight months I was Chief of the Construction Division there, in charge of construction within the Seattle District, which included Oregon,

(Testimony of Grant Gordon.)

Washington, Northern Idaho, Montana, and a considerable amount of construction in Alaska.

Following that duty I became Chief of Operations in the Seattle District Engineer's office and held that job for about a year. During that time I was sent to Fort Leavenworth, where I graduated from the Command and General Staff School, came back to the Seattle office and resumed that job as Chief of Operations for a month or so. Then in February of 1945 I became Chief of the Engineering Division in that office, in which position I had charge of all engineering design and specifications for the District, both civil and military.

In February of '46 I was mustered out of the Army as Lieutenant-Colonel.

Q. Did you have anything to do with the preparation of the Boeing airfield?

A. That is correct; I had charge of the investigation, design and construction and extension to their existing [548] runway and some 70 acres of parking apron for the B-29s, the big boys, together with landing facilities and some rather large-size hangars, and these were particularly tough jobs, because the field is at tide level and the foundation is all tide flats, requires stabilization and some drainage, and some piling in some cases and filled by compaction in others. A very tough soil mechanic's problem. It required investigation and very detailed laboratory investigations.

Q. Well, after your Army experience generally, where did you return?

(Testimony of Grant Gordon.)

A. I came back to work for the Bureau of Reclamation in Boise and I was assigned to the Owyhee Project to construct a waste-way, a project which was later changed. It was during that time that the break occurred.

In the fall of 1946 I was transferred to the Regional Office and I have been there ever since, and I am now Regional Engineer for the Region I.

Q. Were you present at or immediately following the break of the North Canal on this project and, if so, when did you arrive there and who was there when you got there?

A. I first saw the break in the North Canal on about the 15th of July, the day after the break. That was Monday morning. When I arrived at the site of the break Mr. Spofford and several of his men were there and examining the site of the break. [549]

Q. Who is Mr. Spofford, so he can be identified here?

A. He is the Irrigation Manager for the Bureau of Reclamation and in charge of operation and maintenance for the Owyhee Project.

Q. What equipment, if any, was on the ground, or what men were there?

A. He had several of his operational maintenance crew on the site and had started the mobilization of equipment for the repair of the break, and some time during the forenoon their first dragline and several of the trucks went to work on the production-of-gravel operation.

(Testimony of Grant Gordon.)

Q. Could you at that time, at the time you got there, get down into the bottom of the canal and work in the canal to repair the break?

A. It was not possible to get down into the bottom of the break. It was still flowing a heavy volume of water through the break and down the hill. It was not possible to do any work in either the canal or on the break.

Q. Just describe what you did there in connection with Mr. Spofford in mobilizing this work and how soon you got into the canal for the purpose of repairing the break.

A. Well, I discussed with Mr. Spofford the equipment which he had already contracted for and had mobilized. He had already contracted for two D-8 'dozers——

Q. Now, who was in charge of those 'dozers?

A. Well, in the actual repair of the break I was, personally.

Q. Well, but who owned the 'dozers that he had contracted for?

A. One 'dozer was owned by Clowers Brothers and the other was owned by Mr. Terhune.

Q. Mr. Terhune was the gentleman who testified in the case?

A. That is correct.

Q. And how many trucks were on the job in the repair of the first break and handling of the rock material that was needed for your supply of gravel?

A. There were from five to seven dump trucks, as well as several service trucks, flatbeds and pickups.

(Testimony of Grant Gordon.)

Q. Now, generally, in the repair of the break did you have sufficient stock pile in sufficient quantity to keep the work going at all times after you had prepared the bed of the canal? Did you or did you not?

A. The area within the break was relatively restricted. We had all the equipment that we could use to an advantage in the repair of that break, as to the bulldozers and the earth-moving equipment on the break and the trucks and shovels that were used to deliver aggregate to the site of the break.

Q. Now, if you will, just describe to the Court the nature of the break and just what you proceeded to do.

A. The break was about 15 feet wide on the bottom and about [551] 50 or so feet wide on the top, and when I saw it it had eroded to a depth of some 7 feet in the bottom of the canal from the erosive effect of the draining water. The first operation which we began was to square up the bottom of the canal, both upstream and downstream of the break, stock-pile the material which we took out in that operation just outside the break for re-use in the repair. We beveled the upstream and downstream abutments of the break to receive the patch and to key the patch to the existing bank. We dug two cutoff ridges across the site of the break parallel to the axis of the canal, backfilled the trenches and the break itself with a mixture of the materials which had been stock-piled from the bottom of the canal and some imported gravel, pit-

(Testimony of Grant Gordon.)

run gravel, as far as the material which had been removed from the canal held out. When that material was used up we imported material from the excess piled along the banks of the canal upstream and downstream from the break. The material was mixed, blended, compacted by the operation of the tractors themselves and such other equipment as was working across it. It was sprinkled where necessary and made a very dense, compact fill.

Q. Would you take the pointer and approach the map—or approach the model,—let's see, that is our No. 53. Would you take that pointer and point out on your model where that first break occurred. Go ahead and explain it, now, what you found and what you did in your operation. [552]

A. By removing this large piece which is colored red, the pieces in the bottom of the canal, which should include this piece that I am now pointing to, represents the condition of the bank at the time of the first break. To key the patch to the existing banks we cut off the areas colored red as indicated on the model. These beveled cuts sloped both upstream and downstream and toward the canal section, so that the weight on the patch would tend to seat it solidly on the existing canal bank.

We dug two cutoff trenches in the bottom and up the sides of the existing canal banks,—Due to mechanical difficulties, I have only shown across the bottom here, but the trenches were dug up the isde—and backfilled this entire area with selected blended material.

(Testimony of Grant Gordon.)

Q. State whether or not you removed all the soft material from the banks and from the bottom of the canal.

A. We did. We cut into the upstream abutment of the existing canal—or upstream abutment of the break, with the 'dozers squared up the corners until we were into firm, hard material. We cut into the downstream abutment of the break with the 'dozers somewhat further than we did on the upstream abutment, until we were certain that we were into firm, sound material. We also squared up the bottom of the canal to improve the hydraulic qualities and to prepare it to receive additional fill material from the top. [553]

Q. If you will take the seat now. Then in the operation after you had—Well, what did you note in the bottom of the canal?

A. It was a sandstone formation, made up of many layers of varying thickness. The eroded surface was stepped from a point opposite the break some 7 feet deep up to the normal bottom grade of the canal, some 350 feet upstream and approximately 100 feet downstream from the break.

Q. State whether it was porous material or otherwise.

A. The material appeared to be very tough. The erosion from the waters had loosened some of the layers by undercutting and we removed these layers to get a good bond with our backfill material.

Q. State whether or not at either end of the

(Testimony of Grant Gordon.)

break solid material was obtained for your foundations on both ends of the lower bank.

Mr. P. J. Gallagher: We suggest that is very leading and suggestive, your Honor.

The Court: Yes, I think it was.

Mr. Hess: Withdraw the question.

Q. State to what point or points you dug your core trench for the placing in of your materials and the preparation of your bank walls before placing the materials in.

A. We dug the core trench across the bottom and up both sides of the break into what we determined to be sound material. [554] We cut away material at the water site on each abutment of the break with the cats until we were in firm material, and in addition the cutoff trench on the downstream abutment was cut with a dragline with a yard-and-a-half bucket,—We dug the cutoff wall up the face of the abutment of the break.

Q. Now, as to the bottom of the canal, how far did you go relative to soft materials?

A. The soft materials in the bottom of the break were entirely removed. The material on which we started our cutoff wall was sound and hard, and we dug into that material some 3 feet with a trench that was approximately 3 feet wide.

Q. How far under the floor of the canal as normally existed before the washout was this first stratum of this porous material which you describe?

A. Well, in the first break there was no soft material visible. The materials that were left there

(Testimony of Grant Gordon.)

by the eroding waters were sound and firm and looked tight. We——

Q. What do you mean by “tight”?

A. Watertight.

Q. All right. Now, if you will just describe to the Court the repair that you were making on the bank and what happened there prior to the second break.

A. About some time Wednesday morning, nearly noon, we had brought the repair in the first break up to the point where we could see that we were in position to receive some water [555] that evening. I discussed with Mr. Spofford the advisability of allowing a small flow of water to pass the break and told him that I considered that it would be possible to pass a small flow of 20 second-feet of water past the break. About six or seven o'clock that evening we had the repair of the break up to approximately the normal elevation of the normal high-water line of the canal. I checked the elevation with a level to make sure. At about eight o'clock in the evening of Wednesday I cut the cofferdam which had been placed about 350 feet upstream of the break to allow a flow of water past the break. The cofferdam was filled at least up to or slightly above the normal high-water line in the canal. I cut through the cofferdam a depth of about a foot and a half to admit water past the cofferdam, but the cofferdam went out rather quickly. It was built out of fine materials. The water went out in the canal. Shortly after it had

(Testimony of Grant Gordon.)

been allowed down the canal the first patch overflowed, a flow of water of some——

Mr. P. J. Gallagher: Would you read that last sentence there? I didn't get it.

The Court: No, no. Just go ahead. You can get it out of the record afterward.

A. There was a flow of water about an inch deep, from one to two inches deep, over a portion of the patch.

Q. (By Mr. Hess): What portion would that be?

A. It was the downstream, the extreme downstream portion [556] of the patch was overtopped first. That flow of water washed about three inches of loose material from the top of our patch. That was material which could not be normally compacted by the operation of our equipment. There was only a certain amount of loose material on top.

The cat owned by the Clowers Brothers was located downstream of the patch, on top of the canal bank. The cat belonging to Mr. Terhune was parked below the canal bank. I had excused him and was planning to send him home. He had been on the cat some sixteen hours already that day. When the patch overtopped I asked the Clowers cat to go back upstream. He came upstream carrying a 'dozer-ful of material, expecting to stop the overtopping, but it was obvious that that was not the quickest way to overcome the difficulty, so the Clowers cat walked across the patch and went up to the sit of the cofferdam and started to replace it.

(Testimony of Grant Gordon.)

He did replace the cofferdam and had it in place by some time between nine and nine-thirty in the evening.

Q. All right, how long had water overtopped the bank up to that time that the cofferdam was replaced?

A. Well, it had ceased overtopping the break before the cofferdam was completed.

Q. And in what length of time from the time you started?

A. I estimate it that between thirty and forty minutes it flowed over the patch. [557]

Q. Go ahead, then, and complete what happened.

A. The Terhune cat had started up when I called for him to come up on top of the bank and had mired in the field just downstream—just upstream and a short distance out from the toe of the canal bank. With the help of some of the neighbors we got the cat out, using the Clowers service truck, and with the help of the Clowers cat digging a road down the outside of the bank for the Terhune cat we got both cats up on the bank and started to work raising the elevation of the patch. We worked on that until about eleven-thirty, by which time we had between two and two and a half feet, nearly two and a half feet, on top of the patch. At this time I excused Terhune, told him to go home and get some sleep. The Clowers cat continued to add material to the top of the patch.

About midnight, as we had computed, the cofferdam which we had replaced was completely full and

(Testimony of Grant Gordon.)

we allowed it to overtop, and the water again came past the site of the break. After about a half an hour we noticed that the fill again overtopped, the second overtopping. The Clowers cat continued to add material. The overtopping stopped. We were able to get ahead of it. The water in the canal—The elevation of the water in the canal subsided. Water was passing down the canal without difficulty, until some time——

Q. Well, how long did this second overtopping last? How [558] long did that last?

A. Not over twenty minutes, twenty to thirty minutes.

Q. Did it wash away any of the material on the top of the embankment?

A. Yes, a slight amount, some three or four inches, but no serious amount. No amount of damage was done by the overtopping.

Q. Was that loose material that had been washed away?

A. That is correct.

Q. Just go right ahead.

A. I was standing on the downstream end of the patch watching the action both of the tractor and the water, when I heard the—heard an unusual noise, turned my flashlight into the canal and noticed a vortex some three feet in diameter which had formed directly opposite from where I was standing.

Q. And where directly opposite?

A. I was standing at the extreme lower end, just opposite the patch; I was just downstream

(Testimony of Grant Gordon.)

from the patch, not 10 feet from the end of the patch. The vortex was located at a point, as near as I could tell, about directly over the outside toe—That is not what I want to say—directly over the toe of the inner slope of the canal, where the inner slope intersects the bottom line of the canal. I turned my flashlight outside of the canal to see where the water was going, noticed a heavy discharge of water from a tubular hole, I would call it, which [559] appeared to be about two to two and a half feet diameter, from the toe of the bank just above the elevation of the field. I immediately called the attention of the cat operator——

Q. Which one?

A. That was Mr. Wiley Clowers. First I tried to signal him to back up. It was dark, very dark. I had a flashlight and he couldn't see me very well, so I pointed the flashlight to the vortex to show him what was going on. He got off his cat, came out and looked at the vortex, realized what was happening and got back on his cat and moved it upstream, off the site of the break. The heavy discharge of the water very rapidly eroded the material beneath where I was standing. The top portion of the bank fell in and the water rushed out through the opening. It dug the second break down across the farmer's field and joined with the canyon dug by the first break, and the water continued on down the hill in about the same area that it did on the first break.

(Testimony of Grant Gordon.)

Q. Did any part of that water flow over the top of the bank?

A. No portion of the water which was involved in the flow came over the top of the bank. There was no overtopping of the bank.

Q. How far below the top of the bank was it,—That is, the water level—at the time that that vortex appeared?

A. The water level was below the normal high-water surface of the canal. [560]

Q. Now, describe what that vortex is, in order that we will get that clear. What do you mean by that?

A. It is a morning glory-shaped phenomenon. It looks in the large scale just like the vortex that forms when you pull out the plug in the bathtub.

Q. And the effect of that, as you have described as to whether or not the under portion of the bank of the canal below where you had put in the new patch had washed out, letting the bank drop in? Is that what had happened, as you have described it here?

A. Well, the material through which the blowup occurred was completely downstream and completely separate from any material that we had placed, the original patch. It was through the original structure, the original stratum. It was some 25 to 30 feet downstream from the material through which we had dug our cutoff trench in the first patch.

Q. And then what did you do, Mr. Gordon?

A. There was nothing that I could think of to

(Testimony of Grant Gordon.)

do then except to make sure that the cats and the equipment were safe. All the water which was scheduled to come past the site of the break had already been ordered turned off by Mr. Spofford at the time of the first overtopping. There was nothing further I could do then.

Q. Do you know how long it takes water to come down from the dam to this point of the break? How long the water—— [561]

A. I think it takes approximately twenty-four hours to deliver water from the dam—from the reservoir to the site of the break.

Q. All right, just go ahead, then, and describe your operations generally for the second break.

A. The first thing that was necessary was to drain the area. There wasn't anything that we could do about stopping of flow immediately. The water continued to drain out through that break most of that day, and we started early the next morning on the repair of the second break.

We had nearly exhausted the gravel supply from which we got materials for the first break and we had used up easily accessible materials in the bottom of the canal, so it was necessary to get some additional equipment to bring materials in from a greater distance. Some additional muck trucks and some additional draglines and a sprinkler wagon were engaged, and the gravel delivery end of the organization began to stockpile additional material in preparation for the repair of the break.

As soon as we could get into the canal we again

(Testimony of Grant Gordon.)

started repair in the bottom. At this time we set the dragline on the downstream side of the break and started to investigate the soundness of the bank downstream from the site of the break. The erosion from the break had cleaned out any evidence of that material, but after we started digging with the dragline [562] within 10 or 15 feet downstream we immediately ran into a very unstable type of material which lay in a very definite stratum, the top of which was about 4 feet below the bottom grade of the canal. The stratum itself was about 3 feet thick. With the dragline we dug completely through this stratum for a distance something over 300 feet downstream from the break, until we reached a point where the stratum dipped down and where it became—gave a tight, a watertight, solid, competent appearance. The cut which we made with the dragline was then backfilled with a mixture of the selected material and gravel. The first patch, which had stood firm, was broken down and the material used in the bottom of the second patch, additional materials imported by carryall from the adjacent canal bank mixed with the pit-run gravel, sprinkled and mixed, blended, and worked into place with the 'dozers, and the entire patch brought up to the designed height of the canal bank. In addition, we backfilled with selected materials mixed with gravel in the bottom of the canal to bring it up to designed canal grade. Then we placed a layer of pit-run gravel on the inside of the outer canal bank, thicknesses varying from six

(Testimony of Grant Gordon.)

inches at the top of the bank to, in some places, as much as six feet at the grade of the canal, to protect against leakage and to strengthen the bank. When that was done we admitted a small flow of water past the break and gradually, over a period of several days, [563] brought the canal back up to full operating capacity.

Q. And what did you do relative to material for the bottom of the canal that you had scraped down to solid formation of which you speak and cleared out? What did you do to bring that level up to the level of the floor of the canal?

A. When we repaired the first break we placed material, 'dozed material from the top of the bank above the canal into the bottom of the canal and spread it out for a partial backfill of the canal to canal grade. The material was a very light silt. It was not sufficiently stable in itself to make a complete repair. Our plan was to continue the gravel operation, to mix gravel with that silt, while the canal was in operation.

Q. Was it planned to line the——

A. A better way would be to say that we would blanket that silt with gravel.

Q. Was it the purpose to blanket the side wall as you built up that wall?

A. Blanket the side wall as well as the bottom of the canal.

Q. And you were not through and had not completed, as we understand your testimony, your first repair when this blowout happened below that

(Testimony of Grant Gordon.)

where you were repairing and doing that work?

A. That is correct. The operation was still going along as fast as we could prosecute it. [564]

Q. All right, then what did you do after that went out to fill up the floor of the canal to the floor level up from below, where you had removed the soft material, the soft earth?

A. When we had repaired the second break we put the canal back to the usual grade, using a mixture of selected fine materials and pit-run gravel, which was compacted in place.

Q. And did you place silt from the top of the bank into the canal and, if so, how far upstream was it put into the canal from the upper bank?

A. We put into the bottom of the canal as far as the cofferdam—that was the upstream limit of the erosion in the bottom of the canal—and we repaired it downstream as far as there was any erosion, which was about a hundred to a hundred and fifty feet.

Q. Was there any silting placed over the top of the upper bank on up higher upstream?

A. No, we put no blanket on the upstream slope of the canal. We did straighten that out by hand, using picks and shovels to smooth the section, to improve its hydraulic characteristics and to get a small amount of additional width to make up for fill which we planned to put in, so that we could not encroach on the water section.

Q. And that was all done while you were there working on the canal? [565]

(Testimony of Grant Gordon.)

A. That is correct. That was during the entire operation.

Q. I will ask you this question: What, in your opinion, from your experience as an engineer and your observations here and your own work in the bottom of that canal, was the cause of the first break?

A. I think the cause of the first break was very similar to the cause of the second break, which I observed, in that a stratum located at some depth below the bottom grade of the canal actually failed structurally. By that I mean it collapsed, it lost its homogeneity, it broke down structurally.

Q. And what was the cause of it breaking down, in your opinion?

A. I believe the introduction of seepage through the bottom of the canal and through broken joints had allowed the stratum to saturate, and it was in places, the points of the breaks, under full flotation, completely lubricated, and without sufficient internal structure to resist the load that was placed on it.

Q. And what was, in your opinion, the cause of the second break?

A. I think it failed in the manner I have described, similar to the one I have described, by the failure of the stratum below the bottom grade of the canal, which collapsed, allowed the bank to move out and down.

Q. In your opinion, was the overtopping or turning of water [566] in, the overtopping, any part of

(Testimony of Grant Gordon.)

the break—that is, the cause of the second break?

A. In my opinion, the overtopping had nothing to do with the first or the second break.

Q. Did those overtoppings make any wash or prolongations of the wash as shown in Plaintiffs' Exhibit No. 82?

A. The water which topped, which got over the top of the bank, flowed down the same wash which was produced by the first break.

Q. How far downstream, that is, below the toe of the bank, did it join with the other flow?

A. You are speaking now of the overtopping?

Q. No, no, I am talking about the second break.

A. The second break joined the first break at a point some hundred and fifty feet out from the toe of the canal bank.

Q. And that accounts for those excavations that are shown in 82—or in—yes, in 82—that is, the fingers that point up there?

A. That accounted for the two forks of the wash.

Q. Yes, that is what I say, the two forks of the wash. Will you step down to the model here and demonstrate, now, by the handling of the lower portion, that second break?

A. (Witness demonstrating with Defendant's Exhibit 53.) Removing this portion of the remaining loose pieces, this illustrates the relation of the two forks to the two breaks. [567]

Q. Could you point out the strata up and down

(Testimony of Grant Gordon.)

the canal, along the bed of the canal, of which you speak, the top strata.

A. The one which I observed lies at about the relative elevation shown in brown.

Q. That is, you are pointing to the second break?

A. That is right. We found it by excavation through the bank of the canal and into the original structure to a depth some 8 feet below the bottom grade of the canal for a distance of some 300 feet downstream from the second break.

Q. You may be seated. Now, state whether or not there was anything that indicated a necessity for sealing the upper bank of the canal at or near the points of the break and where you had made this repair using the hand labor crew.

A. We straightened up the inner bank for a distance of some 300 or 400 feet past the site of the breaks. We did that by smoothing the rough surface which then existed and left a smooth slope. In so doing we exposed the stratum which existed in the upper bank for a distance, as I have said, of some 400 feet. That was from about 250 feet above the break to some 150 feet below the break. The stratum as was exposed appeared to be perfectly competent, tight and sound. We have some photographs that indicate that.

Q. Was there any material then placed over the bank along that while you were there?

A. Not while I was there. [568]

Q. Would you hand the Exhibits 42 and 46 to the witness. Would you turn to Exhibit 45—I want

(Testimony of Grant Gordon.)

to see if I have got the right number here—and show the Court what that represents and from where the picture was taken during the course of your construction of this repair?

A. This is Exhibit 45. The picture was taken from the top of the crest of the canal, looking almost due north over the site of the first break. It shows the tapering in horizontal plane of the fill, the two Caterpillars, tractors, stock-piling the material which had been taken from the bottom of the canal, and shows the hand crew working at the top and squaring up the inner slope of the canal.

Q. Then the pile of materials to the right, where the Caterpillars are, are the loose materials that were taken out from the bottom of the canal that were later blended with your gravel in repairing the bank, is that correct?

A. That is correct. I also notice some equipment parked out there, cars and service equipment.

Q. Now, if you will take Exhibit No. 44 and describe from where and whence that was taken and what it shows.

A. That is taken from a point on the outside canal bank downstream of the first break. It shows the Terhune cat stock-piling material from the bottom of the canal; it shows the Clowers cat starting to cut into the upper bank to reach sound material for a key; and at the bottom of the photograph [569] shows a small portion of the gravel which had been stockpiled. On the background, right background, it shows the hand crew working on the upper end of

(Testimony of Grant Gordon.)

the portion of the inner bank which we straightened up and squared up.

Q. Will you refer to Exhibit No. 42, please, and explain from which direction that picture was taken and what that shows?

A. That is similar to the first picture I described, in that it was taken from the crest of the hill above the canal, from a point upstream almost to the site of the cofferdam, and it is pointing almost north, looks out across the site. It shows the hand crew working on that upper slope and shows a view of the completed slope on the portion immediately upstream from the first break. That portion of the bank is ready to receive the gravel blanket which we put on it.

Q.' And will you refer to Exhibit No. 43, please, and describe that to the Court, from where it was taken and what it shows?

A. This is a view taken from the crest of the hill, just at the top of the canal slope, looking a little bit west of north, almost down the center line of the outer canal bank, at the site of the break. It shows the first cofferdam, the stock pile of materials which had been removed from the bottom of the canal, it shows the shape of the bottom of the canal after we had squared it up. It looks on down the canal to show the condition of the canal down to and past the site [570] of the break.

Q. Now, what you call the stock pile, that is indicated by the pile of material down—out in the field

(Testimony of Grant Gordon.)

upstream from the automobiles which you have talked about? A. That is correct.

Q. The cutting of the bank that you notice from the cofferdam, what is that?

A. That is opposite the cofferdam?

Q. Yes, opposite the cofferdam?

A. That is the cut where the materials for the cofferdam were secured. Further downstream, on the back side of the picture, is the site of the break.

Q. Which break?

A. The first break.

Q. Now, will you please refer to Exhibit No. 46 and describe that to the Court, please?

A. This is a view taken from the center of the canal, looking a little north and east, through the first break, and it shows the character of the materials which were left by the scouring water. The material on the left-hand side of the picture is the material through which we dug the cutoff trench underneath the first patch.

Q. And when was that picture taken?

A. This picture was taken either Tuesday or Wednesday. I think it was Tuesday. To the best of my recollection, it was [571] Tuesday.

Q. And the break was Sunday, as I understand?

A. That is correct.

Mr. Hess: If your Honor please, should we proceed further with this witness now? If we could review his testimony I think perhaps we could save time and cut this shorter, if we could have a recess until morning, sum up with this witness.

(Testimony of Grant Gordon.)

The Court: How many more witnesses have you?

Mr. Hess: If your Honor please, we would have, taking the lay witnesses, some nine witnesses, but many of these will be very, very short witnesses, or some of them will be.

The Court: Let's see, how many have you had today? Four?

Mr. Hess: What is that?

The Court: How many witnesses have you had today?

Mr. Hess: Well, if your Honor please, we have had today on the stand three, three separate witnesses, with this one, three very principal witnesses. This man made the actual repair, of course.

The Court: Well, are all the witnesses lay witnesses from now on?

Mr. Hess: No, your Honor, we have a disinterested engineer, that is, not with the Department of Reclamation, and more for hypothetical questions concerning this matter. Then we have one engineer, the irrigation engineer, Mr. Spofford, [572] who was on this bank of the canal first when the situation happened. Then we have the ditch rider.

The Court: Well, it will take all day tomorrow for those two, won't it?

Mr. Hess: Well, I don't think it will, your Honor. I don't think it will.

The Court: It will unless you make faster progress than you have made today.

Mr. Hess: Well, we are putting on our principal

(Testimony of Grant Gordon.)

witnesses that we have today. We have been putting on our principal witnesses, we feel, in the order of their importance.

The Court: All right, I will adjourn tonight, and tomorrow I will go right straight through. If I let you go now I expect you to finish your case tomorrow. If you finish it by five o'clock, all right; if not, we will hold until you do.

Mr. Hess: Well, if your Honor please, I would just as lief go all night, if you want to go all night long. I am not saying that, your Honor. But we think this is an important case and we must present it. I am telling you that I feel we can save time by stopping now with this witness and then proceed, and if you wish to proceed, all right.

The Court: I haven't any feeling that you ought to go on now, but if you can organize your case tonight so that you won't have to run your case tomorrow night it is all right with me. [573]

Mr. Hess: I thought that we would be able to get through our testimony, when we started our testimony, in two and a half days, but I am revising my estimate now. I don't think it can be done, and I don't think it can be done tomorrow. Frankly, I don't think it can be done.

The Court: Well, I will hold tomorrow night. I will adjourn tonight and let you organize your case, in the hope that you can get through so we won't have to hold too long tomorrow night.

Mr. Hess: Well, we will try that, your Honor. We will work very fast with that object in mind.

(Testimony of Grant Gordon.)

The Court: All right, court is in adjournment until tomorrow morning—would you like to start at nine in the morning?

Mr. Hess: I think that would be better.

The Court: Adjourn until tomorrow morning at nine o'clock.

(Whereupon, at 5:10 o'clock p.m., Tuesday, June 15, 1948, the trial of the above-entitled cause was suspended, the Court taking an adjournment to 9:00 o'clock a.m., Wednesday, June 16, 1948.) [574]

Wednesday, June 16, 1948, 9:00 A.M.

GRANT GORDON

thereupon resumed the stand as a witness in behalf of the defendant herein and was examined and testified further as follows:

Direct Examination (Resumed)

By Mr. Hess:

Q. We were discussing the photographic exhibits, I believe, when we closed yesterday evening. I wonder if the witness could be handed Plaintiffs' Exhibits, photographic exhibits 18, 19 and 20. Referring to photographic Exhibit No. 18 of the plaintiffs, showing the caterpillar in the bottom of the canal, will you explain that to the Court and what the black bank and the light material, all of that to the left of the caterpillar, represents?

(Testimony of Grant Gordon.)

A. The caterpillar is starting to work to clean out the bottom of the second break and square it up with the patch, and the material to the left of the caterpillar on the lower bank there is all material which was placed in the first patch and it is still standing intact.

Q. And does that show clear through across as the second line the heavy material below the skyline showing the upper bank?

A. That is correct. [575]

Q. And it includes clear to the left side of the picture? That is all a part of that lower bank, is it, that you put in?

A. It is all part of the patch, yes, sir.

Q. Part of the patch. And the caterpillar that is in there, what is it doing?

A. It is squaring up the bottom of the break to get down to sound material to begin the second patch.

Q. Referring to Plaintiffs' photographic Exhibit No. 19, showing the caterpillar and material to the left and to the right and a dark object up in the right-hand side of the picture, will you explain that all to the Court?

A. This picture is taken from a slightly different angle than the previous picture, just a few feet upstream from the previous picture. It shows the material placed in the first patch to the left of the picture, it shows the tractor cleaning out loose material in the bottom of the break, and it shows the

(Testimony of Grant Gordon.)

bucket of the dragline in the upper right-hand corner starting the excavation of the trench. The bucket is dumping at the moment the picture is taken.

Q. Does that show any part of the patch of the first break?

A. The material to the left of the caterpillar, to the left of the picture, is all patch.

Q. Of the first break?

A. Of the first break, the first patch.

Q. Then that dark object at the right there that is up on top and shows——

A. That is the dragline bucket swinging out to dump.

Q. Now, referring to Plaintiffs' photographic Exhibit No. 20, Mr. Gordon, showing the caterpillar tilted to its right, will you explain that and that operation, what is going on there, as shown by that picture?

A. That is the caterpillar in the second break, a detail view showing it cleaning out at the base of the first patch. The water that you see there is from the second break. He is digging down to get the firm material at the base of the first patch to start the keyways for the second patch.

Q. And this material, then, to the left of the caterpillar, or on the tilted side of the caterpillar, that material is all a part of the first patch, is that correct?

A. That is correct, all the material that you see to the left of the dozer is material from the first patch, the first break.

(Testimony of Grant Gordon.)

Q. If you will hand that to the Court, please. Now, Mr. Gordon, I believe you stated that at the low end of the bottom of the canal at the point of the water in the canal—that would be the upper portion of the bank, the lower bank, the upper portion of the lower bank—how deep was it that you said that you had to excavate there, that had been washed? That is, that you——

A. The first break, the scour in the bottom of the canal at the inner toe of the outer bank was approximately seven feet.

Q. Now, in preparing your base, your solid base, and for the first patch, how deep did you go in clearing that same stratum out to the toe of the bank? How deep were you?

A. The erosion had stepped down. The hole, the break, was deeper on the outside of the bank. The foundation had to be squared out, be excavated to an additional depth of some ten feet below the erosion in the bottom grade of the canal. That made a total depth out at the toe of the bank of some seventeen feet below the bottom grade of the canal. That was at the outer toe of the canal bank.

Q. In your qualifications, Mr. Gordon, as you gave yesterday, you testified to the effect that you were in charge of all geological investigations on the Columbia Basin Project for seven years and had charge of the analysis and investigation of earth fill materials for the South Coulee Dam and the North Coulee Dam, about two hundred miles of highway and of railroad grade; is that correct?

(Testimony of Grant Gordon.)

A. That is correct, yes.

Q. And that you made the investigation on causes and treatment of major earth slides at the Coulee Dam and made percolation and stability tests on earth foundation and earth fill materials for that project.

A. That is correct.

The Court: That is all in the record now. No use to repeat it.

Mr. Hess: I was just asking it to lay the foundation for [578] this question.

The Court: I am sufficiently impressed without repeating it.

Q. (By Mr. Hess): I will just ask this question, then: You testified yesterday concerning the manner of the first patch. What did you do to determine where the first patch should end? What did you do to make that determination?

A. Well, first I examined the bottom of the canal, the entire eroded area, from several hundred feet above the break to several hundred feet below the break, the wash and field below it, to determine the break; I carefully examined both sides of the break, the floor of the break, the wash and field below it, to determine the nature and habit, characteristics of the formations, to determine what might be the proper method of procedure. It was a difficult patch to place. It consisted essentially in building an earth dam on a foundation which was sloping the wrong way and which had to be keyed in just like a dam into the existing canal banks. The investigation

(Testimony of Grant Gordon.)

which I did make consisted of careful examination and digging with a pick and digging with a shovel and observing the operation of the D-8 caterpillars, which were the biggest cats we had available, the operation of the dragline bucket as we dug the trench across the bottom of the break and up the side of the break on the downstream side.

Q. What did you observe as to the condition of the exposed strata of the downstream canal bank during the placing of that [579] first patch?

A. Well, they appeared to me to be entirely competent, they appeared to be water-tight and they appeared to be sound and they appeared to be as good as any of the other strata visible in the entire vicinity. I saw no reason to experience any difficulty with that above.

Q. Tell the Court concerning the characteristics of the exposed strata that you observed in the downstream abutment and the bank adjacent to the first break.

A. Well, the strata consisted of what I called a sandstone, typical of what we call the Payette formation, which the geologists now call the Idaho formation. They are beds of sandy lakebed formation. They dip and strike very considerably over very short distances. The strata are difficult to distinguish one from the other, because their characteristics change rapidly. While a bed may be tight and hard in one locality, ten feet away it may be considerably softer or harder. It was a difficult thing to patch.

(Testimony of Grant Gordon.)

Q. Did you observe the strata in the uphill side bank of the canal in the vicinity of the break?

A. Yes. We stripped off the loose material on the upper slope and squared that slope to a smooth surface, as indicated on some of your photographs. We did that by hand. I went over that slope many times. We had to take that material off with picks and bars. It was hard and firm and dense and it was not [580] an easy matter to move. It was sound and I regarded it as competent material for a canal.

Q. What do you say as to the porosity and permeability of the strata that you observed in the upper bank, that are shown in Plaintiffs' Exhibits Nos. 73, 76 and 77, if you will point that out and explain?

A. At the time of the——

Q. If you will step back, so the Court can see it, Mr. Gordon.

A. At the time of the repair—I am pointing to Exhibit 76 now—we cleaned off this stratum for the full distance of about two hundred fifty feet upstream of the first break and some one hundred fifty feet downstream of the first break to a smooth surface. The stratum exposed then was hard, dense, and appeared to be tight, an entirely competent formation for operation of a canal.

Q. And what about 73?

A. This, as I understand it, is a closeup of that same stratum. It gives a very loose appearance now. The materials which you see in there have been loosened by weather and by some dropping out of place. The materials as shown on the left side of

(Testimony of Grant Gordon.)

the picture indicate its stratified nature. If you strip off this loosened outer portion you will find a dense, hard, compact structure there which is essentially tight. It has some gravel shown in the stratum when you view it in its natural state. The gravel is bedded firmly and tightly in fine material. It [581] is only when the weather loosens it up that it gives it this appearance.

Q. And what do you say as to the material shown and where it came from in those pictures 73, 76 and 77? That is on the upper——

A. I believe this material which is shown loose here at the bottom is material which has been dozed off the top of the bank and is lying—this is two years, as I take it, since the break.

Q. I think you may be seated now. You have examined Plaintiffs' Exhibit No. 80 here, the map, or the drawing, rather, that is shown on the board. You heard the testimony of Mr. Merritt, and you have examined that exhibit, have you?

A. That is correct, I have.

Q. From your examination of the exposed strata in the canal about which you have just testified, what is your opinion, with reasons, as to whether there is a porous stratum in the upper and lower banks of the canal, as illustrated on that exhibit?

A. Well, in the region of the break, as I have testified, upstream and downstream from the break, in the bottom of the canal and in the exposed portion of the outer canal bank as we dug it in both the first and second breaks, this stratum——

(Testimony of Grant Gordon.)

Q. That is, you are referring to the uphill bank?

A. On the uphill side—no pervious stratum appears on the [582] upper side of the bank within the wetted perimeter, no porous stratum appears above the bottom grade of the canal on the downstream side, or in the outer bank. The slopes of the strata across the break are not uniform. This stratum does not dip down to the bottom of the canal (indicating).

Q. That is the upper stratum shown?

A. The stratum indicated at the water line on the uphill side of the canal does not dip down through. I could not follow that stratum across. There was a porous stratum uncovered after the second break. When we dug the trench downstream from the break we found a porous stratum lying in a position below the one shown here.

Q. And how far below the bottom level of the canal?

A. Some four feet below the bottom grade of the canal to the top of the stratum. The stratum itself was about three feet thick. It was lying at a flatter angle than that shown on this drawing.

Q. And was that the first stratum of porous material that you found underneath the lower bank?

A. That is correct.

Q. And does that apply to the lower or second break as well as the first break?

A. It applies particularly to the second break, because that is the best opportunity we had to get

(Testimony of Grant Gordon.)

into the stratum at the lower bottom grade of the canal. [583]

Q. I think you may be seated now, Mr. Gordon. On your model here that is Defendants' Exhibit 53, in drawing the second break there I see there are no what are called trenches made for a core. Were there trenches made for core in the second fill that you made?

A. Yes, sir. We broke down the remaining existing floor which was the first patch and dug into the toe of it until we could connect with the cutoff trench which we had dug across the first patch. We dug that trench some three feet into the native materials, and continued it on downstream completely across the patch and for some three hundred feet downstream from the break, the second break.

Q. Now, the materials at either end of the break—and that would apply to the first break and the lower end of the later break—after you removed the soft materials how did that appear as to being hard or otherwise, or soft, or what was the condition of it?

A. I don't know that I know just the point you are referring to.

Q. Well, I am trying to get at——

A. The materials on the first break exposed in the abutments of the break were sound. When we looked at the materials in the second break the upstream abutment was originally patched, the downstream abutment still appeared to be sound, but as we dug into the thing with our dragline to

(Testimony of Grant Gordon.)

make positive assurance we [584] hadn't dug more than ten feet before we ran into this weak stratum which I have described some four feet below the bottom grade of the canal, and we followed that one north, downstream, until it had again become firm and tight.

Q. Now, then, Mr. Gordon, I will ask you if since you made that repair you have observed the condition of the bank, the lower bank, and down to and including the toe of the bank, on various occasions since the commencement of this trial?

A. Yes, I have.

Q. And state to the Court what is the condition of that, if there is any seepage there whatsoever, or just describe the condition.

A. The outer bank appears to be dry and tight, no evidence of seepage whatever.

Q. Now, does that apply all the way across the Shaw property? A. That is correct.

Q. What is known as the Shaw property? Have you examined the bank up through to and including the Hust property? A. Yes, I have.

Q. Upstream? A. Yes, I have.

Q. What is the condition of that bank?

A. The bank is dry, no evidence of seepage for a mile upstream of the break.

Q. Now, where do the vegetation and trees—from what point [585] do vegetation and a row of trees that exist on the Shaw place and as shown in that picture No. 79—where does that commence with reference to the toe of the bank?

(Testimony of Grant Gordon.)

A. This is 69.

Q. Sixty-nine, yes, 69.

A. The trees shown in Exhibit 69 are all growing within two feet of the original service ditch, the farm ditch, along the toe of the bank.

Q. That is the farm ditch, is it?

A. The farmer's ditch, that is correct.

Q. And what does the vegetation show generally, as to whether it shows above that bank or below toward the farmer's field from that ditch?

A. The only vegetation now appearing in that area, such as sweet clover or willows or alfalfa, is all growing within reach of capillary water of the farmer's ditch, a distance of two feet.

Q. And how far would you say that that capillary water reaches up on the upper side, or below the bank of the ditch, how far from the farmer's ditch?

A. Oh, roughly, a foot in elevation.

Q. Now, then, referring to Exhibit No. 82 and the four and some tenths acres that are shown there on both sides of this wash, state whether or not you have examined the condition of that ground and in particular two or three hundred feet of that [586] ground since the commencement of this trial?

A. Yes, I have.

Q. And what is the condition of it?

A. Very dry.

Q. Is there any evidence of any seep whatsoever from the canal in any respect there?

A. I could see none whatever.

(Testimony of Grant Gordon.)

Q. And does that cover and include across, clear across, the Shaw properties?

A. Well, there is seepage observable on the Shaw properties in the gulch to the north of the area shown on Exhibit No. 82.

Q. And how far is that downstream from this property and the point of the break?

A. Well, it is somewhat in excess of three hundred feet from the break.

Q. And what, if anything, has been done there to take care of that seepage? Any tiling or anything—

A. Shortly after the completion of the repair on the second break we installed something over two hundred feet of drain tile parallel to the farmer's ditch and almost on its alignment, immediately north of the gulch that we are speaking of, to pick up seepage and to stabilize the surface, the support, at the toe of the canal.

Q. Now, then, in your opinion, where that water was and where you filled in, does that have anything to do with the bank, with [587] either the upper or lower bank, near and in the vicinity of this break?

A. I think not.

Q. Now, on the Hust land, where do the vegetation and the trees, the first trees, line of trees, show with reference to the farmer's ditch on the Hust property?

A. The Hust property is immediately upstream of the Shaw property. The trees growing at the

(Testimony of Grant Gordon.)

outer bank of the canal are all within two feet of the farmer's ditch.

Q. Is there any vegetation whatsoever at any place through that Hust property along the line of the ditch, any green vegetation along the——

A. I could find none.

Q. Clear from the bank to the toe?

A. That is correct.

Q. Now, then, when you had constructed your repair did you place any piping or tiling, or anything of that nature, down in below where you made the repair and toward or near where this wash is shown on Exhibit 82, to take care of any seepage if it should happen?

A. Yes, we did.

Q. Describe that to the Court, will you, please?

A. The fact that the canal bank blew downstream from the first break raised a little question of the stability that might be in the area just above the first break, upstream of the first [588] break, so we constructed a string of tile, some two hundred fifty feet as I recollect, in the field just about fifteen feet outside the lower toe of the canal bank, parallel to the canal bank and the farmer's ditch, to pick up seepage if there were any, and stabilize the foundation of the toe of the canal bank. We did that while the repair of the second break was being made.

Q. State whether or not there is any seepage there now, if you know, in that tile?

A. No, it is perfectly dry.

Q. In other words, the bank does not seep, is that right?

(Testimony of Grant Gordon.)

A. It dried up in about a week after we had dug it.

Q. Would you describe where this cat was stuck and the condition of the situation down there and what you think was the cause of it?

A. The cat was stuck at a point about where we dug the—where we installed the tile. Three days previous to the first overtopping one of the cats had been using that particular area to service. They parked the cat there several times. They had operated service trucks across that area quite freely.

Q. And, of course, the water had flowed out through the first break prior to that time, had it not?

A. That is correct.

Mr. Hess: That is all. [589]

Cross-Examination

By Mr. P. J. Gallagher:

Q. Mr. Gordon, just answering further on that question right there, the water flowing out of the first break did not flow over the place where the cat stuck? A. I would not know, sir.

Q. The cat was stuck further south from where the flow took place, wasn't it?

A. I was not present at the first break, and I suspect that the water would spread out over that area before it cut the gulch.

Q. Well, the cats weren't there after the water was in there at all, were they?

A. That is right.

Q. The cats were not there after the first flow?

A. That is right.

(Testimony of Grant Gordon.)

Q. Did you understand that counsel asked you whether the water flowed over from the first break after the cat had been stuck?

A. That is right, I didn't understand it that way.

Q. Will you tell us now, as near as you can, how high the new fill was built up above the normal water flow line in the first break when you turned your head of water in?

A. It was right at the normal water surface, within a very few inches.

Q. And that would be how high in feet? [590]

A. Well, it would be over six feet above the normal bottom grade of the canal.

Q. Six feet above the normal bottom grade of the canal?

A. That is correct.

Q. And how high was it when the water started to run over it?

A. That is substantially the same elevation. That is what I intended to convey.

Q. And what was the rate of flow down the canal at that time when she was running over?

A. That I can't say exactly.

Q. What is your judgment as to the amount of water going down and the rate of flow?

A. Well, that is a matter of very difficult hydraulics. It is the summation of the water which came out of the stored water behind the cofferdam plus whatever active flow was in the canal. It could only be estimated accurately if you know the velocity. I don't know what the velocity was.

(Testimony of Grant Gordon.)

Q. Do you know what the normal rate of flow down that canal is?

A. At full capacity, with the canal operating freely, it is approximately 450 second-feet.

Q. Do you know what the normal velocity is down through there?

A. About two and a half—approximately two and a half feet per second.

Q. Now, as I understand it, the cofferdam was regulated and [591] then there was some intervention and then there was a second overflow of the water. How high had you got the canal bank up by that time?

A. To my best estimate, it was something over two feet above the water line.

Q. And what was the width of the water surface at that level?

A. The width of the water surface?

Q. Yes.

A. Oh, it must be about thirty feet. The canal is over-wide there, wider than the design section.

Q. Now, you came out there on Monday morning, July 15th, when you first saw the vicinity of the break?

A. That is right.

Q. As I understand it, this break occurred Sunday, sometime in the middle of the day. Have you got the exact hour, or nearly the exact hour, from your records?

A. No, I can't tell you. I understand it came sometime around noon.

Q. Sometime around noon on Sunday?

(Testimony of Grant Gordon.)

A. Yes.

Q. When you got there on Monday morning what amount of water was escaping through the canal break?

A. Oh, I didn't note very closely, but it was, oh, fifty or sixty second-feet, as a rough guess.

Q. That was some eighteen to twenty hours after the approximate [592] time of the break in the canal?

A. That is correct.

Q. How long did that continue to flow at that rate or a diminishing rate before you could get in and make any observations for doing work?

A. Well, we could make observations at that time. We couldn't do any effective work in the bottom of the canal until the next morning.

Q. That would be Tuesday morning?

A. Tuesday morning.

Q. Had the water ceased running Tuesday morning?

A. There was a small trickle still running in, which we closed off with the cofferdam.

Q. And when did you put the cofferdam in to close off any flow down there?

A. That was Tuesday.

Q. During the early part of Tuesday?

A. Well, it would be completed along Tuesday afternoon.

Q. Did that effectively shut off the flow so you could go to work then?

A. That is correct.

Q. Now, as I understand your testimony, the entire bed of this canal was either washed away or

(Testimony of Grant Gordon.)

washed down very low, both sides of the first break?

A. There was considerable erosion, yes, sir. [593]

Q. How far upstream did the eroded surface end?

A. Approximately three hundred fifty feet.

Q. Would that be about where the cofferdam was?

A. That is correct.

Q. Then from the cofferdam on down to the break it had eroded down to where it had reached a depth of some seven feet below the normal bottom of the bank?

A. That is right, about the line of the inner toe of the bank.

Q. And it had eroded also on the downstream side?

A. That is correct, but to a lesser extent.

Q. That was because of the water running back?

A. That is correct.

Q. And what area of the bottom of the canal showed that erosion, for what distance up and down the canal?

A. Well, it wasn't uniform completely across the width of the canal.

Q. I appreciate that, but for what distance up and down the canal? Three hundred and fifty feet from the upper end, and how far down below?

A. Oh, I would think about one hundred fifty feet—about one hundred feet, I would say.

Q. That would be approximately four hundred fifty feet?

A. That is correct.

Q. Now, in making your repair, and after you

(Testimony of Grant Gordon.)

got your key wall in, had you finished that work before the water was turned [594] in?

A. I don't understand you. Finished what work?

Q. The raising of the bottom of the canal up to grade?

A. No, sir, we hadn't intended to finish it. We had——

Q. The bottom of the canal hadn't been raised up to grade before you turned the water in?

A. That is correct.

Q. How far below the bottom of the grade do you think it was, Mr. Gordon?

A. Well, that was a varying proposition. I think the maximum was about between three and four feet.

Q. And then it would feather out toward either end?

A. That is right.

Q. You aimed to turn in, as I got your testimony, about twenty second-feet?

A. That is what I requested, yes, sir.

Q. And how was that run through the cofferdam? How did you get the water through the cofferdam?

A. I cut the cofferdam with a shovel.

Q. I see. What time of day, and on what day, did you start the water through the canal, the twenty second-feet?

A. Well, I didn't handle the water. I requested it Wednesday morning for Wednesday night.

Q. For Wednesday night?

A. That is right. [595]

(Testimony of Grant Gordon.)

Q. And when was the cofferdam taken out so water could pass the cofferdam?

A. I cut the cofferdam about 8:00 o'clock Wednesday evening.

Q. And that was when the flow of water passed through there? A. Yes, sir.

Q. And you aimed to get about twenty second-feet? A. Yes, sir.

Q. And was that for the purpose of puddling the bottom of the canal?

A. No, that was to get water through the canal and begin delivery, and we would continue our repairs during delivery.

Q. And at that time the bottom of the canal at its deepest place was three feet below the normal surface? A. Approximately.

Q. And a more or less distance below for the entire length of the break?

A. That is right. The silt was not in itself sufficient material to complete the repair in the bottom of the canal.

Q. What were you going to do then?

A. We were going to blanket that with pit-run gravel.

Q. But you hadn't got around to working at that yet?

A. Well, that was a question of getting delivery fast enough at that point, and we planned to put the gravel on during operation.

Q. But no gravel had been put into the bed of the canal before [596] the water was turned in?

(Testimony of Grant Gordon.)

A. No, sir.

Q. And that, you say, was about 8:00 o'clock Wednesday evening? A. That is correct.

Q. Now, that area where the ditch bed was still below surface, would that extend far enough north to be opposite where the second break took place?

A. Yes. Not at the full three-foot depth, though.

Q. No, no, I appreciate that. Then for an area three hundred fifty feet above the break and a hundred to a hundred and fifty feet below the break the ditch bed was exposed and not brought back to level at the time you turned the water in Wednesday evening?

A. I will agree it was not back to level. I don't quite understand what you mean by exposed.

Q. Well, I mean to say——

A. It was covered. It was all covered.

Q. With what type of material?

A. With silt from above the canal.

Q. That is the silt that was pushed in from the upstream side? A. That is right.

Q. Well, while we are on this water question, let's go a little further on that. About 8:00 p.m. the cofferdam was cut and water started past. At what time, then, did it begin to run [597] over the bank of the canal?

A. Oh, I would estimate within thirty or forty minutes.

Q. Thirty or forty minutes? A. Uh huh.

Q. So you must have been getting a bigger head than twenty second-feet?

(Testimony of Grant Gordon.)

A. It could very easily have been.

Q. Well, as a matter of fact, twenty second-feet wouldn't have run over the bank of the canal?

A. Well, you must remember that when I cut the cofferdam I had to release the water that was stored behind the cofferdam also.

Q. I understand; and that would have caused a flow of more than twenty second-feet?

A. That is correct.

Q. And, as a matter of fact, it would have caused a flow big enough to run over the embankment?

A. That is correct.

Q. And then did that alarm you when it started to go over the bank?

A. I wasn't particularly happy about it.

Q. I understand.

A. But from the standpoint of stability I wasn't concerned about the patch.

Q. Well, you did, then, attempt to cut the flow down? [598]

A. Oh, yes; we put the cofferdam back in.

Q. All right; then how long was that cofferdam effective in shutting off the flow before you had your second run over the top?

A. Until after midnight.

Q. Until after midnight.

A. Shortly after midnight.

Q. Then it started to run over the top again?

A. We filled the cofferdam, as we had anticipated. At this time we allowed it to run over the top. We then considered we were ready for it.

(Testimony of Grant Gordon.)

Q. And you made no attempt to stop the flow upstream and it came on over the cofferdam and into your new work?

A. No, that is not correct. The water had been ordered shut off by Mr. Spofford when we overtopped the first time.

Q. Oh. Now we are talking about the second break?

A. That is right.

Q. Now, when in the operation, do you know, did Mr. Spofford order it shut off?

A. As soon as he saw it overtop.

Q. And where did that shutoff take place?

A. I am not very good at telling that.

Mr. P. J. Gallagher: Mr. Spofford will be on the stand, will he?

Mr. Hess: Yes, he will be on the stand. [599]

Mr. P. J. Gallagher: Very well.

Q. Then during that operation you called Mr. Terhune back to assist in raising the canal bank?

A. That is right.

Q. And how long did he work until you finally discharged him that evening?

A. To the best of my recollection, he worked until about 11:30.

Q. All right. And the Clowers cat was still working?

A. That is correct.

Q. And what were they doing?

A. They were on top of the bank, dozing material out on top of the patch, raising the patch.

Q. Now we are talking about the first patch?

A. That is correct.

(Testimony of Grant Gordon.)

Q. And Terhune left about 11:30; and then what time was it you began to notice this vortex?

A. That was about 1:30.

Q. About 1:30. And had the Clowers cat been working continuously during that interval?

A. Practically continuously, yes, sir.

Q. Where was he carrying his dirt from, which end of the break? A. From the south end.

Q. He was working on the south end. During that evening, and before Terhune got away, had Clowers worked on the north end at all? [600]

A. He was on the north end, servicing, when the first overtopping occurred.

Q. You mean servicing——

A. Servicing his cat, putting in lubricating oil and gasoline.

Q. And then did he go back and continue to work on the south end?

A. Yes; he went back first on the cofferdam.

Q. And stayed on the south end?

A. Yes, sir, that is correct.

Q. And the work on the south end was done by Terhune? A. That is correct.

Q. Now, after the second break how long did it take that water to run out before you could get in to the base of the canal again? It took place——

A. I don't know that I could answer that exactly. It took most of that day.

Q. Well, it went out at about what? 1:00 o'clock?

A. That is right.

Q. On what day?

(Testimony of Grant Gordon.)

A. That would be Thursday morning.

Q. Thursday morning. And then when were you able to get in to go to work?

A. Well, it appeared obvious that there was no chance that day, so we organized our crews for the next day.

Q. That would be all day Thursday? [601]

A. That is right.

Q. Beginning at 1:00 o'clock in the morning?

A. That is right, but I can't tell you when it completely ran out that night.

Q. That is right. Well, anyhow, it ran Thursday and Thursday night——

A. I don't believe it ran Thursday night.

Q. You don't? A. No.

Q. What is your best judgment as to when it ran out to the point where you could go to work?

A. Oh, I don't know. Sometime during Thursday night.

Q. Sometime Thursday night.

A. You understand our crews were almost completely exhausted and were at home asleep during that night.

Q. I understand, and you did a very noble job of exposing yourself. Then when the water finally receded to the point where you could go to work, you took the cats in, as shown by these exhibits, and started cleaning off the floor of the canal so that you could go to work?

A. This was in the second break?

Q. The second break. A. Yes.

(Testimony of Grant Gordon.)

Q. How much erosion in the floor of the canal did the second break cause? [602]

A. Oh, something less, considerably less, than the first break. It is difficult to distinguish which was which, because the two went together.

Q. That is what I was going to ask you. The erosion from the second break got right back through to the first break?

A. That is true. The erosion came down through the soft material and into the hard material quicker.

Q. And did it erode further on to the north than the first break had caused?

A. Not seriously, not noticeably. There wasn't much water in that direction.

Q. Now, when you got in and determined what was the cause of the second break, you put the cats and dragline in to assist there? A. Yes.

Q. And how much of that bank did you take away with your dragline, or your dragline and your dozers, north of the second break?

A. We set a dragline as far inside on the roadway as we could safely set it, then we dug a trench with a yard-and-a-half bucket. The slope was quite steep. I would guess that we took away probably fifteen feet laterally, horizontally, and sliced fifteen feet thick from the inside of the outer bank,—is that what you are asking me?

Q. I am not at all familiar with what you did there. That is [603] why I am asking these questions. Did you cut across the bank with your dragline?

A. Across the bank?

(Testimony of Grant Gordon.)

Q. Yes.

A. No, sir; we were cutting parallel with the bank.

Q. Parallel with the bank and back about fifteen feet from the edge of the bank, the inside edge?

A. From the inside toe.

Q. Now, wait a minute. I am not so sure that I followed you. You were cutting from the inside of the lower bank?

A. The dragline was setting on top of the bank.

Q. Yes.

A. As far inside as we could safely set the dragline. The trench automatically followed, then, the center line of the machine.

Q. You were digging the earth from the inside of the canal?

A. That is correct.

Q. What did you do with that earth?

A. We put that earth into the bottom of the canal and then spread it upstream, mixed it with gravel, and used it to fill the bottom of the canal.

Q. Now, then, what was the nature of that earth as to being water-soaked or otherwise?

A. The stratum below the bottom grade of the canal which I referred to was completely saturated.

Q. That was completely saturated?

A. Yes, sir.

Q. And how high up on the bank did you find saturation?

A. Well, there was some saturation on the face of the bank up to the water line for some distance.

(Testimony of Grant Gordon.)

Q. And how far in, Mr. Gordon, into the wall of the canal?

A. Well, I remember no evidence of saturation in more than two feet, except in this one stratum. There was some moisture, but not saturation.

Q. Well, all right, was it sufficient to cause you to take out that entire bank there?

A. No, sir. The thing we were rooting for was the weak stratum underneath.

Q. Well, what did you find?

A. That one stratum was the only thing which we found which caused me any concern.

Q. Well, I don't care about your concern, but what I am after is facts, now, as to how far that bank was either saturated or very wet? I am speaking now of the bank north of the second break.

A. Yes. The saturation was confined to this stratum. The——

Q. That was at the base of the bank?

A. Opposite that there was some saturation of the inner line of the canal for some two feet.

Q. And how far up and down the canal was that condition? [605]

A. I think that was common throughout the canal. The inner side, the water surface, was saturated.

Q. I see. That would be, then, over a distance of four or five hundred feet?

A. Yes, sir. I think that is perfectly normal. I would expect that anyway.

Q. And, of course, in the spots where the break occurred you are not prepared to say how far in

(Testimony of Grant Gordon.)

that saturation took place? A. No, sir.

Q. The only point that you are now testifying about is the remaining portions of the canal bank that you made this test on? A. That is correct.

Q. And how far down the bank on the lower side did you carry out that experiment?

A. We dug the trench, continued for over three hundred feet below the second break, downstream from the second break.

Q. And you found that condition on the inside bank in as far as——

A. We followed the condition in the stratum until it completely cleared up. We went past the end of the saturation in that lower stratum.

Q. And you found the inner bank saturated to the extent you testified to for about that same distance? A. That is correct. [606]

Q. Now, was that stratum—let's talk about that just a minute—was it dipping outward and down toward the valley about the same as the other stratum that was exposed there?

A. I don't believe I could tell from looking at one side of the stratum which way it was dipping. As far as it was exposed in the trench it had a slightly concave attitude and dipped down slightly to the north. That is, as we went north in the trench the stratum dropped slightly.

Q. Would that be what the other witnesses have called a rake?

A. I have no idea what Mr. Merritt meant by "rake."

(Testimony of Grant Gordon.)

Q. Well, would you say that was a rake or dip in that stratum, or strike?

A. A dip refers to a plane. I would describe it simply as a slightly curved surface.

Q. That would be a dip. Now, what is a strike? What is your idea of a strike?

A. Well, a strike is theoretically a horizontal line in a stratum which would mark its intersection with a horizontal plane.

Q. That is right. And then what would be your idea of a rake? Doesn't that indicate a slope in one direction or another?

A. I haven't any familiarity with the term "rake" in connection with strata.

Q. All right, then, forgetting technical terms, didn't that stratum have a slope to the north and also a slight slope to the [607] east?

A. I suspect it had a slope to the east, but we didn't crosscut it in that direction so I can't be positive.

Q. Anyhow, it was a slope away from the upper bank of the canal? A. That could be, yes.

Q. Did it have the same slope and appear to be the same type of an outcropping as that outcropping shown in Exhibit No. 70, on top, above the ditch? A. This is 70?

Q. That is right; and I am calling your attention to the outcroppings above the ditch, in the center of the picture there.

A. You are referring to these——

(Testimony of Grant Gordon.)

Q. I am referring to those dark substances right where you have your ruler right now.

A. Here (indicating) ?

Q. Yes.

A. In general, these appear to slope to the east, that is correct.

Q. Yes.

A. I would like to point out, though, that there are changes in the dip exposed——

Q. Yes, I understand that.

Mr. Hess: Let him explain it. [608]

Mr. P. J. Gallagher: Stay right on the one I am asking you about, then you can make your explanation afterwards. Now, was the stratum you found in the bottom of the canal similar to the ones exposed there in 70, the ones we have just been referring to?

A. I will agree that they are of the same geological nature, but I will have to point out that they change in engineering characteristics quickly and widely.

Q. Well, you can do that when your counsel takes you over, Mr. Gordon. Now you may take the stand. When you finally finished up your complete repairs you had built an entire new bank on the lower side of the canal?

A. It amounted to that for a distance completely across both breaks and some distance both upstream and downstream.

Q. And you had also cut your key wall into the bed of the ditch and below the bed of the ditch

(Testimony of Grant Gordon.)

for some distance, hadn't you?

A. That is correct, and some additional distance.

Q. And some additional distance, yes. And that was the only practical and efficient way of stopping the seep in that substratum, was to key it all and fill it with impervious material?

A. Well, that was the only quick method at the time.

Q. And it was the efficient way?

A. Yes, I think it is. [609]

Q. As a matter of fact, since you made that type of repair the ditch isn't leaking along there?

A. To the best of my knowledge, it is not.

Q. I think we could agree on that. Now, when you started to clear away the debris from the second break how far back were those banks entirely water-soaked? You spoke something about it being a sort of a loblolly that you ran into there.

A. Well, I testified that the inner face of the outer bank was soaked for a distance of about two feet. The wettest stratum we found was the one below the bottom grade of the canal. That had very little structure.

Q. By that you mean it was almost fluid mud?

A. That is right. A slight disturbance would just break it down completely. If you kicked it with your foot it would collapse, it would break down into almost quick sand.

Q. Did you hear the testimony of Mr. Terhune to the effect that when he drove his cat over that

(Testimony of Grant Gordon.)

area it would somewhat give? Did you hear his testimony?

A. I heard his testimony, yes.

Q. Now, when you say that that portion was so weak there that it would give way with any kind of shock, would you think that Mr. Terhune's testimony experienced about that same kind of effect?

The Court: Now, just a moment. You can't expect him to pass on the conclusion of some other witness. [610]

Mr. P. J. Gallagher: No. I am sorry, your Honor. I withdraw that.

Q. Anyhow, that structure there was so weak that you say almost any shock would have taken it out? A. I wouldn't go that far.

Q. Well, you said that if one would kick that vigorously it might——

A. What I said was that if you would kick it with your foot the structure would break down.

Q. Oh, I see; and not go out?

A. It would break down, it would reduce in volume and form almost quicksand there, a quicksand characteristic, but you had to disturb it to get that.

Q. And that is what you found when you got into that second break?

A. In the canal bank just downstream from the second break, yes, sir.

Q. Now, were you familiar with the fact, or the alleged fact, that the ditch was leaking, or that there was evidence of water rising—I will put it

(Testimony of Grant Gordon.)

that way—in the Shaw field for the whole distance under both of these breaks?

A. I don't know just how to answer that question. I heard the testimony to that effect but I don't believe it.

Q. I see. Well, if those are the facts, wouldn't that indicate that there was seepage getting through the canal [611] walls there, either below or above the water line, or above or below the bottom line of the ditch?

A. Well, I think we could agree that if there was seepage there must be a seepage somewhere, yes, sir.

Q. Yes; and you will also agree, won't you, that if there was seepage that it was coming from a water supply, a water source?

A. I think that is correct, yes, sir.

Q. And you will go one step further and say that it had to come out of the ditch, won't you?

A. I think in large part.

Q. Now, were you familiar with the ditch before the break and before it was repaired?

A. No, sir.

Q. You were not. What is your estimation as to whether they had ever lined the inner bank prior to the repair?

A. I haven't any.

Q. However, you did line it?

A. Yes, for a long distance on the outer bank.

Q. So your repairs that you made, Mr. Gordon, would not only put in a key wall far enough down to shut off any water that came in through these

(Testimony of Grant Gordon.)

strata, but rebuilding the canal bank and also lining the canal bank?

A. That is correct. We reinforced it for a long distance upstream and downstream. [612]

Q. And since that time it has been holding?

A. As far as I know, yes, sir.

Q. Now, knowing what you do know as a result of checking that break, would a core wall just simply laid on top of the surface, if you call it a core wall, would that have any effect at all on shutting out the water that you found down below?

A. It had this effect, it would add weight to the material.

Q. Well, any dirt would add weight.

A. That is correct.

Q. But, other than adding weight there, it had no effect at all, had it?

A. Not on seepage below the limits of the core, that is correct.

Q. And if a core wall was built to the extent of spreading out three cubic yards of earth over a distance of 150 feet and six to eight feet wide, would that small amount of selected material have any appreciable effect on stopping the leak in the canal?

A. I think not.

Q. Now, you made a statement this morning that you did not see or there is not at the present time any seepage above the break or below the break within any distance that would indicate to you that there was any water coming from this ditch. Are

(Testimony of Grant Gordon.)

you familiar, Mr. Gordon, with the very perceptible leak in the Hust field just south of the Shaw ranch?

A. Yes, sir. [613]

Q. And how far would you say that is from the canal?

A. That is from fifty to seventy-five feet below the outer toe.

Q. And about that far away from the canal?

A. That is right.

Q. You wouldn't say that was coming from the farmer's ditch? A. No, sir.

Q. That is probably coming from some subterranean source there? A. Correct.

Q. And how much of an examination did you make of the seep that is running in the canyon north of where the break occurred?

A. I have been around that area considerably, before and during the break.

Q. And it was running a perceptible stream even antedating the time of the break?

A. So I understand.

Q. And there was a very substantial tule growth along there? A. Yes, sir.

Q. Indicating that that water is coming from some substantial source? A. Correct.

Q. And the only other source would be from the canal itself? A. That is, in the main, yes.

Q. Now, we will agree on another thing, and that is, I think, that after you had pared down this inner bank, the mountain side [614] bank, that no work was done in silting that at all?

(Testimony of Grant Gordon.)

A. That is correct. None appeared necessary.

Q. Is it your opinion that the material in the upper bank is impervious to water or would not disintegrate if water was applied to it?

A. Well, that isn't the same thing. There are two questions there.

Q. Well, I will ask the first one first. I don't know enough about hydraulics to see the difference.

A. The material in place is quite impervious, tight.

Q. And if the materials were displaced and put in water would they absorb water?

A. I should think so.

Q. And then what keeps them from absorbing water when they are in place?

A. I think it probably would if water were supplied.

Q. Well, it is supplied, isn't it, by the ditch?

A. Yes, if there is water in the ditch.

Q. Well, water is in the ditch about seven months a year, isn't it?

A. That is correct.

Q. And to a depth that covers that entire area?

A. Well, I hope we are talking about the same thing.

Q. I hope we are. If not, we are wasting time.

A. You are referring to this stratum right down here at the [615] water line (indicating)?

Q. That is right, in Exhibit 71.

A. It is certainly obvious that water is entering that stratum there by capillarity.

(Testimony of Grant Gordon.)

Q. That is very obvious.

A. That is correct, but I never knew of the phenomenon of capillarity, high capillarity, to be present at the same time and at the same place where there is high permeability.

Q. Now, then, calling your attention to that part of the upper bank that is exhibited and shown in Exhibit No. 73, I ask you if you would not find a condition there where the water would permeate and also be subject to capillary action?

A. This loose material would soak up very quickly.

Q. Yes.

A. The loose material which is weathered on the face of this stratum would soak up very quickly, but I will say that if you clear this stratum off and get back to firm material in a foot or two it will be tight.

Q. Well, what you are saying is that if you could keep cutting off the mud you might beat the water back, and the action of the water, and you might get back to dry material?

A. What I am saying is that if you examine this stratum back far enough to be undisturbed it is tight.

Q. And how far back in there would you have to go in there to find tight material? [616]

A. I would think you might not have to go back beyond two feet.

Q. Now, if I understand it, when your ditch was

(Testimony of Grant Gordon.)

completed you cut all that material down and spread it over the bed of the canal?

A. That is correct.

Q. So that whatever material you see on the bottom of the canal now is something that has slid off from the upper banks in making your repair?

A. It has slid off and has been 'dozed off.

Q. As a matter of fact, there has been no 'dozing in there since you finished your work?

A. I wouldn't know.

Q. That sand and gravel in there, that chalky substance, that hasn't been 'dozed off?

A. No, sir; that has fallen off.

Q. That would indicate that the material that has fallen off there through the years——

A. That is right, but it does it by capillarity.

Q. You will not admit that that water might not soak in there by gravity and get under the canal?

A. I am not sure that I understand your question.

Q. I say, are you willing to admit that water might soak back through that stratum and by gravity get down under the bed of your canal?

A. Well, I would have to presuppose that there is something below this stratum which is more porous than the stratum itself.

Q. Well, you would hit a stratum down there that was so porous that it was like quicksand?

A. That is correct.

Q. And are you willing to admit that this water

(Testimony of Grant Gordon.)

that soaked through the bank of the canal got down through there?

A. I will admit that that would be entirely possible, but it needs some method of passage.

Q. Now, doesn't it show that that stratum reaches down below the bottom of the canal?

A. Not that stratum we have been talking about.

Q. And no tests have been made?

A. Yes, sir, we cleaned that off. I examined that time after time, and there are many strata between the one you are talking about——

Q. You are not prepared to say that those strata are not entirely connected?

A. They lie one on top of the other.

Q. And you are not prepared to say that water did not get down into that stratum?

A. No, sir.

Q. And evidently, Mr. Gordon, there was a very great amount of water got into those lower strata?

A. There was a considerable amount of water in the porous [618] stratum that I have referred to, yes, sir.

Mr. P. J. Gallagher: Will you give him our Exhibit No. 28.

Q. Will you examine that exhibit, Mr. Gordon, and particularly as it shows the bed of the canal to your right-hand corner, and then say whether or not, in your judgment, water applied to that type of stratum would not work its way down?

A. These beds or strata are essentially hori-

(Testimony of Grant Gordon.)

zontal.

Q. You mean they lay flat?

A. That is correct. In place, undisturbed, they are very massive. This particular bed that you are referring to in the right-hand corner here is quite massive, quite dense, and unless something occurs, some joint or something of a similar nature, it is quite impervious to water moving in a vertical direction. The tendency is more for water to move along horizontal planes.

Q. Well, it is just loose gravel, it is just rock, disconnected rock, there for two or three feet depth in that stratum, isn't it?

A. That is correct, but you must consider that this material has been eroded and dissected by the rush of water. It is not in its native condition.

Q. And you think before it was eroded it was impervious?

A. I think it was relatively tight, yes, sir.

Q. Now you are using the term "relatively" there, and that is coupled up with the testimony of another witness here indicating that it might slowly percolate—— [619]

A. I will agree that water will go through the formation, but at a very slow rate.

Q. And assuming that this canal was built in '34 and it went out in '46, it evidently did take a long time to percolate down.

A. I can repeat that it percolated at a very slow rate.

Q. Now, one more question: When you com-

(Testimony of Grant Gordon.)

pleted your work on the first break did you reach a conclusion as to what caused that first break at that time?

A. I had formed a conclusion as to what I thought caused the first break as soon as I had examined it, yes, sir.

Q. And what was the conclusion that you then formed, borne out by your experience in fixing it up?

A. My conclusion was completely upset by what I saw at the second break.

Q. All right, what was your conclusion as to what caused the first break that you arrived at at the time you fixed it?

A. I concluded that it might have failed by failure along some joint in the underlying stratum. I couldn't find such a joint by examination up and down the stream, but that was the best conclusion I could draw at that time.

Q. And then when you went on to repair the second break you changed your conclusion you had arrived at at the time of the first break?

A. I watched the second break. I was standing right at it.

Q. And your conclusion now is that both breaks were caused [602] by the giving way of the stratum at the canal bank?

A. I think the causes were very similar.

Q. Have you given any consideration to the possibility that where these two breaks occurred the seepage into the bank may have been greater

(Testimony of Grant Gordon.)

than two feet and may have seeped clear through, causing a leak on the other side?

A. Yes, I have considered that.

Q. What have you to say as to the probability of that?

A. I think the probability was small, because we examined very carefully the portion of the ditch bank which went out in the second break before it broke. There was no evidence there of excessive seepage.

Q. There was no place near where there could be a demarkation between the waters that seeped into the bank and the waters that were below the surface?

A. That is a pretty difficult determination, yes, sir.

Q. Did you hear the testimony of one of the witnesses to the effect that he was directed to go upstream and turn down some water?

A. Yes, I heard the testimony.

Q. I think that was Mr. Percy. Who in your engineering crowd would be the one who directed him to do that? Would that be you?

A. I made my request to Mr. Spofford.

Q. I see. You don't have any recollection of directing Percy [621] or any others?

A. No, I didn't issue orders to the watermaster.

Q. Now will you give us your best judgment on the amount of water and the rate of flow of the water that was in the canal at the time that it overlapped the last time?

(Testimony of Grant Gordon.)

A. Well, that is a very sketchy thing to estimate without some knowledge of the velocity. The water was moving very slowly. The total of water moving past the break is a summation of the amount that was in storage at the cofferdam plus the water that was flowing on top. In trying to estimate the area I would say something around a hundred second-feet. That is sufficient to fill the canal. I promise you the canal was full, but it was moving at a very slow velocity, so the actual quantity was low.

Q. What would hold that water back and make it move slower than the normal flow down the canal?

A. In the first place, the canal below the cofferdam was much wider than the section at the cofferdam. We had overdug it.

Q. Was there anything below the second break to impede the water flow?

A. In the second break the banks of the canal were very dry, but there was no encroachment below the second break.

Q. What is worrying me is how you got so much water into that new canal so fast. Now, you had your canal bank built [622] up to a foot and a half to two feet higher than normal, you say.

A. Yes, sir.

Q. And then your water came down in such amount that it ran over. A. Yes.

Q. Now, what I can't understand is how you could get that much water down there so it would

(Testimony of Grant Gordon.)

run over the bank so soon, when you could regulate it up above.

A. Are you asking me a question?

Q. Yes.

A. You didn't make a question out of it.

Q. How did that happen?

A. The best answer is, I don't know.

Mr. P. J. Gallagher: Okeh. That is enough. That is all.

Redirect Examination

By Mr. Hess:

Q. Referring to that exhibit there, No. 71, again, and to what has been referred to in previous testimony as half-moons, you describe that condition as indicating a falling off there caused by capillarity, is that right?

A. That is correct. The material above the wetted line showing in 71 is essentially a silty material, having no great strength in itself. The weathering of the stratum just beneath it removes support so it falls out in these half-moon shapes.

Q. And that silty material has a higher degree of capillarity, [623] as I understand your testimony, than this stratum that shows here that you said is hard, that is designated where the gravel shows, that is, the gravel in 73?

A. Oh, I don't know as I would say it was higher, but they both exhibit capillarity.

Q. Now, what do you mean when you say that

(Testimony of Grant Gordon.)

you can't have both capillarity and permeability at the same time?

A. Well, capillarity is a phenomenon which depends on surface tension, and the phenomenon of capillarity takes place only in fine, very fine, tubes or pores. If the pores or tubes or openings are sufficiently large to allow what we call high permeability, then they are entirely too large to exhibit the capillary phenomenon.

Q. Now, then, you were asked something about whether the ditch was lined prior to the repair. State what you noticed as to the formation. Was that lower bank built up, other than on or near the top, by a fill, or was that in a cut, with the natural earth?

A. Well, the entire wetted perimeter of the watered section was in cut.

Q. And that is the lower bank, is that correct?

A. The lower bank.

Q. And that lower bank was natural, solid earth, is that right?

A. That is right, yes, sir.

Q. What investigation would be necessary to disclose the [624] stratum four feet below the bed of the canal that you found which was porous, the material of which you could break up by kicking with your feet, as you have described?

A. Well, it was necessary to dig down to find it. You had to excavate below the canal grade to reach it.

Q. And state whether or not before your first repair you had run out, entirely out, of that type

(Testimony of Grant Gordon.)

of material, when you made that first repair—whether you had or had not? That is, whether you had cleared it all out for your first repair, that you had found there?

A. Well, in the first repair we found no evidence of a weak stratum in the bottom or the abutments of that break. The strata change rapidly up and down the stream in their manifestations, the degree of cementation and quality changes rapidly.

Q. Well, had you dug down to that stratum in your repair of the first break?

A. We dug down past where it would normally have been found in the same position there as it was downstream. It may have existed for a short distance in the break, but that evidence was gone.

Q. I see; and you had cleared that material out, dug how low below the bed of the stream, in your first repair, and how far up above and below on your repair work in the first repair?

A. Well, we had cleaned the bottom of the first repair completely down to tight, firm material. We had beveled the [625] patch upstream and downstream by digging into the wetted side of the lower bank until we were into firm material.

Q. Was there any indication whatsoever that you found that would indicate a stratum four feet or more below the bed of the canal where the second break occurred?

A. The erosion of the second break had dug down past where this stratum would normally be

(Testimony of Grant Gordon.)

expected to lie. When we rooted into the upstream shoulder of the second break under the first patch still standing we found evidences of the original material there just downstream of the old cutoff trench. The cutoff trench was still intact and still in firm materials there. The weak stratum, if it existed through the second break, was washed away, was gone, and the downstream abutment of the second break still looked solid and sound. It was only after we had dug into it with a dragline for a distance of ten feet or so that we again encountered a weak, incompetent stratum.

Q. At what level below the floor of the canal?

A. That was some four feet below the bottom grade of the canal to the top of the stratum.

Q. And you state that was very soft, as I understand, but the lower bank of the canal in that region only showed softness or permeability some two feet in the side of the canal, is that correct?

A. That is normal to the water surface. [626]

Q. What is that?

A. Normal to the slope of the bank, yes.

Q. Had you done everything, in your own opinion, according to best engineering practices, in cleaning out the bed and the sides of the canal and to the full length that would be regarded as necessary from investigation and observation, in making your first repair?

A. Well, to the best of my knowledge, I did. I did everything I knew how to make that patch stick.

Q. And would that answer apply based upon

(Testimony of Grant Gordon.)

your previous experience and your studies of the past?

A. It certainly would, yes, sir.

Q. Your attention was called to the stratum shown in Exhibits Nos. 70 and 79. Can you take your pointer and point out any stratum condition that shows complete breaks in the stratum that is shown in that picture and, if so, describe any condition that you see there and that you have observed, since you have looked at the pictures, on the ground?

A. In Exhibit 70 there is a marked uncomformity between the stratum shown in the extreme left-hand edge of the picture and that that appears on the ground. There are two distinct dips here. One stratum cuts off and intersects the other one at a suitable angle.

Q. And that is all shown in the little distance of that second white spot, we will say, from the larger hill there where the [627] stratum is shown?

A. That is correct.

Q. That is on the left.

A. There is another one shown in Exhibit 79.

Q. Now, pointing to that—all right, and where does that show, in what——

A. In left center of the photograph, just above the canal.

Q. Is that shown definitely by a dark spot there in the picture?

A. That is correct, and it is very easily evident on the ground.

Q. Yes; and how would you describe that as it is shown on the ground? How would you describe that?

(Testimony of Grant Gordon.)

A. Well, that is as a result of a change in the manner and rate of sedimentation in the old place in which these beds were formed, and it results in a very sharp change and dip in the character of the stratum.

Q. It is in a very short distance, would you say?

A. Yes, sir, it is in a distance of less than thirty or forty feet.

Q. Now, then, you were asked about water coming down—that is, for the first time you had asked for that water. Had you filled in the bottom of the canal with the silt that had been taken from the top of the canal?

A. That is correct, we had covered the entire bottom to some degree. [628]

Q. And you state the water that was turned down did not flow through there with high velocity, as I understand?

A. That is correct.

Q. Yet it did overtop?

A. That is correct.

Q. And your purpose of putting that through, as I understand, was to get water through as quickly as you could to the irrigators below?

A. That is correct, yes, sir.

Q. But it went higher than was anticipated?

A. That is correct.

Q. And was ordered off immediately, as I understand it?

A. That is correct.

Q. In this overflow, in your opinion, did it on either one of those occasions have anything to do with the second break?

A. I think not. I think the overtopping had

(Testimony of Grant Gordon.)

nothing to do with the breaking of the canal the second time.

Q. Did you, according to your best judgment, and did you believe, that the ordering of the water at the time you ordered it to go down the canal, do you feel, that that was in accordance with good engineering practice?

A. I saw no reason to doubt that it was not. It seemed perfectly proper to start the flow of water through the canal at that time. We were set up to continue our repair, to raise the fill, and to blanket the canal. I think it was entirely—— [629]

Q. And how long after the second overtopping was it that you observed the vortex?

The Court: It was 1:30 in the morning. What is the use of covering this ground three or four times.

Mr. Hess: I think that is all.

Recross-Examination

By Mr. P. J. Gallagher:

Q. Just one question, Mr. Gordon: After you had made this first repair did you carry out any experimentations, like drilling in the base of the canal, to determine whether or not there was a similar stratum down where the second break took place?

A. After the first repair?

Q. Yes. A. No, sir.

Q. And before you started to make any repair did you take any borings or make any experimentation to determine how far down the mud was?

A. We had no suspicion of a——

(Testimony of Grant Gordon.)

Q. No, the question was, did you? You can say Yes or No on that.

A. Well, you said "this mud." I had no indication of mud.

Q. Well, maybe I used the wrong term. Did you make any borings at all?

A. No, sir. [630]

Q. When did you send the order in to cut the water off? A. I didn't send it in, sir.

Mr. P. J. Gallagher: I see. That is all.

The Court: Now, if you had not been influenced to a certain extent by the necessity of getting water to these irrigators, which was a very proper consideration to have in mind, you would probably have made further investigation as to what caused that break, wouldn't you?

A. We might have. We had——

The Court: Well, you knew it was not a natural thing for a canal to break.

A. No. We were concerned about it.

The Court: And you didn't know what the reason was? A. No, sir.

The Court: You had no explanation for it at all?

A. We made an assumption, was all.

The Court: You made an assumption which proved to be incorrect?

A. That is right.

The Court: Now, as I understand, if you had had plenty of time you would not have been in doubt as to the assumption? A competent engineer would

(Testimony of Grant Gordon.)

have found out what the trouble was, or have done the best he could to find out?

A. I would think so.

The Court: As a matter of fact, you can find out, can't [631] you?

A. We certainly try. Sometimes we miss, but we usually do.

The Court: If a competent engineer was trying to put in a structure that he knew would stand he would find out what was there, wouldn't he?

A. Yes, sir.

The Court: Now, as you develop it at the present time, there was a structure beneath both the first and the second breaks which during the course of time had become permeated with water, or had become saturated with water, to such an extent that it weakened and under certain conditions would go out; that is your present theory?

A. Might I explain that, please?

The Court: All right.

A. I arrive at that by my observation as I have dug through that stratum and I infer that that is what happened at the second break.

The Court: Now, on the other hand, you repudiate the theory that that slopes down as shown in Exhibit 80, which is the theory propounded by the plaintiffs?

A. I examined the stratum across the floor of the canal at the break very carefully. It is not possible for the stratum which they refer to at the water line

(Testimony of Grant Gordon.)

to dip down and go through there at the point of the break.

The Court: Now, if you had been trying to be sure that [632] this break would not have occurred you would have then made the experiment that you subsequently made; that is, you would have put your dragline down to see what was below in a place beyond the break on each side? That is what you subsequently did.

A. That is right. I don't know if this is proper. Could I explain that a bit?

The Court: Yes.

A. The first break we had no evidence that upstream or downstream we had any unsoundness. That canal bank had stood for twelve years and, to the best of my judgment, if I could put a patch in there that would hold the canal should go on serving. At the end of the second break I realized that I had missed something the first time and that there was not going to be any run-around on the second time, I can assure you. The evidence was not there, even in the second break, that I could point to and say that "this is what caused it," but I wanted to be sure and I was not going to be embarrassed again by another break, so I instructed that dragline to dig in there and dig deep to see if I was again missing the point, and immediately ran into the reason.

The Court: If you had not been influenced by the desire to get water down to the irrigators you would have done that the first time, wouldn't you?

(Testimony of Grant Gordon.)

A. Well, we might have gone further, but I don't think a [633] great deal further, because we had no suspicion, your Honor.

The Court: Well, it isn't a question of suspicions. Suppose you were constructing the Bonneville Dam—now, you don't mean to say that you would build that dam in a place where there would be any condition that would take it out?

A. No, sir, we would recognize that——

The Court: And if an engineer did build the Bonneville Dam in such a situation that it would be washed out by possible floods such as we have now, you would consider that incompetent engineering? A. Yes, sir.

The Court: That is right. Now, then, here is your situation here. It was unnatural and improper and unexpected for this canal to go out.

A. That is right, yes, sir.

The Court: And, under those circumstances, as I say, if you were not influenced by the necessity of moving water through you would have stopped to plug up all the loopholes, wouldn't you?

A. Well, you are asking me a tough question, your Honor. A dam must not fail. We recognize a tremendous responsibility with it. We recognize that we are not able from an economic standpoint to test every inch of a canal bank as carefully as we must test the abutments and the foundation for a dam. If we follow that line of reasoning, then we would be forced [634] to immediately get out there and test every inch of that outer canal bank now.

(Testimony of Grant Gordon.)

We can't afford to do that, so that I think I am right when I say that I question whether we would have done a great deal more exploring if we had had more time after the first break.

The Court: Well, you did it after the second break.

A. Because I had obviously missed something on the first one.

The Court: Well, but then——

A. If the first break had held then we would have assumed that I had guessed it properly, that I had reconstructed it properly.

The Court: Well, all right. Now let me ask you something else. You know that this seepage is down in the Hust field.

A. Yes, sir.

The Court: And you don't know where it comes from.

A. That is correct.

The Court: And you know that there is some seepage to the north.

A. Yes, sir.

The Court: And you don't know where that comes from.

A. No, sir.

The Court: Have you missed something again?

A. Quite possibly. Quite possibly. We will continue to observe that for any clue that will tip us to anything which we consider, which we can possibly consider, dangerous. Seepage per se is not necessarily dangerous. [635]

The Court: Well, I understand, but with conditions of this sort and with a possibility of damage that one of these breaks can cause, don't you think

(Testimony of Grant Gordon.)

that competent engineering would require, perhaps, that you should line the canal with concrete here, after the warning that you have had?

A. Well, first I would like to explain that lining with concrete is not the answer to all the problems in a canal by any means.

The Court: Well, it is the answer to this one, isn't it? Lining with concrete would avoid any break?

A. Well, that gets into economic conditions. We couldn't afford to line the whole canal.

The Court: Well, I am not talking about lining the whole canal. Here is a specific situation in which you have had considerable trouble. Why not, after the first break, say you will line it with concrete here?

A. Because we do not consider concrete lining as the best canal in earth section. We think that an earth section is possibly safer, many times, than the concrete canal. Just lining with concrete is not the answer to safety. Concrete canal linings leak. They have never built a tight one yet. They have built up seepage pressures behind, and you have this element of risk in them, that you think you have something better than you really have, and that is something that is a source of great concern to an operating company. [636]

The Court: Well, can you build a canal that won't break?

A. I think not, no, sir. I don't think it is possible to make a canal that is absolutely perfect. It

(Testimony of Grant Gordon.)

is certainly a difficult engineering problem if you have to consider cost.

The Court: Well, you don't have to consider cost.

A. We have to consider cost to have an economically feasible project.

The Court: Well, but you make your recommendations as to feasibility. Now, if you are not building that kind of a canal, that enters into the recommendations as to feasibility.

A. That is correct.

The Court: In other words, you go to Congress and you say, "now, we can build it, and when we build it it will be an efficient canal."

A. That is right.

The Court: Now, how safe are we going to make it? Isn't that up to you, in making your recommendation of feasibility, as to how safe you are going to build the canal?

A. That is right.

The Court: You can build them so they won't break, almost to a surety?

A. Yes, we can approach that point.

The Court: And isn't that a consideration that you have to take into account when you make your recommendation as to feasibility? [637]

A. Yes, sir.

The Court: Well, now then, we eliminate cost, then, don't we?

A. I wish I could understand exactly what your point is there. We build these canals according to the best standards we know. We are charged with

(Testimony of Grant Gordon.)

trying to develop projects which can be used. We could rule out practically any project that I know of that we are coping with now if we were charged with making them so safe that there was no human possibility of a break. We could not continue the reclamation program if we were charged with making structures and canals which could not possibly fail. Our job would be through. We couldn't go further.

The Court: Well, the only thing you are saying, then, if that was the circumstance, if that was the way it was viewed, that you would recommend against feasibility?

A. No, I think that life and progress to go ahead must take some calculated risk. We take a risk when we start down the stairs; we take a risk when we cross the street. If we played it absolutely safe, I am afraid we wouldn't get very far. The engineer's problem is to see if we can develop a project which is reasonably assured of success. He can't be absolutely positive. There are factors beyond his control, which he cannot completely control.

The Court: And you think that just because a structure [638] happens to be hidden under, as here, three feet of ground, a competent engineer is not required to recognize that?

A. Well, I think he is required to fix it if he knows about it, if he can find evidence that it exists. We will not pass one of those things if we know that it exists, but we are limited by economic considerations as to how far we can insure.

The Court: Well, but after you know of one

(Testimony of Grant Gordon.)

weakness in a thing, before you turn water in, as I say, if you were not influenced by the necessity of getting water in to these crops, you would have insured, wouldn't you?

A. If I had known that that stratum existed down there or any threat existed to that canal I would have fixed it.

The Court: Well, you did know that there was a threat?

A. I am sorry, sir, but I don't recognize an implied threat from there out unless there was some evidence other than the break itself. I have seen similar instances in which all the cause was completely removed. I think that all the cause of the first break, the very proximate cause of the first break, had been removed at the time of the break.

The Court: Well, all right, we are getting into factors which I think are not within your field, so I won't ask you anything further.

A. That is correct.

The Court: Do you desire any examination on either side?

Mr. P. J. Gallagher: No, your Honor. [639]

Mr. Hess: No, your Honor.

(Witness excused.)

The Court: Court is in recess.

(Short recess.)

Mr. Veeder: Call Mr. Spofford, please. [640]

JAMES SPOFFORD

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: State your full name.

A. James Spofford.

The Clerk: S-p-o-f-f-o-r-d? A. Right.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Veeder:

Q. What is your residence, Mr. Spofford?

A. Nyssa, Oregon.

Q. Will you state your age, please?

A. Sixty-four.

Q. Would you give a general statement as to your educational qualifications?

A. I received a B.S. in Civil Engineering from the University of Michigan in 1908.

Q. After leaving the University, would you give a brief statement as to your experience as a civil engineer?

A. My activities as a civil engineer from the time I graduated up until 1926 consisted of engineering surveys, some mining work, and I was with the General Land Office for six and a half years as a U. S. surveyor, and also during that period I operated a farm. [641]

Q. Would you state your experience with respect to the construction, operation and maintenance of irrigation systems?

(Testimony of James Spofford.)

A. In the spring of 1926 I moved to Mountain Home and established an office as civil engineer at that place, and during the next twelve years my work was greatly connected with the maintenance and operation of irrigation districts. I was retained by the Mountain Home Irrigation District during the entire twelve years, serving as their Secretary-Manager. When I went on the job there were three irrigation companies and they were very much disorganized, and during the first six years I reorganized their canal system, making one system for the entire group, and also constructed nine rock tunnels on their upper canal system.

Q. Did you have any other experience besides that, in public office, or anything like that?

A. Yes; in connection with this irrigation system there were three storage reservoirs and also 80 miles of canal. Fourteen miles of this canal was along the Boise River Canyon and was very hazardous ditch. There were nine tunnels and thirteen flumes on high trestles, and it was on more or less moving ground.

Q. You were in charge of the operation and maintenance of those structures, is that correct?

A. That is right.

Q. Now, after leaving that work what did you do? [642]

A. Well, during this same period of twelve years I was also retained by the King Hill Irrigation District as consultant engineer, and from June, 1932, up to December, 1938, I served in that capacity, and

(Testimony of James Spofford.)

their system—a great deal of work was done on their irrigation system, especially the canals. Their main canal carries 300 second-feet of water and it is located along the breaks of the Snake River Canyon.

Q. Was the country comparable to that through which the North Canal follows?

A. Yes, the topography is very similar to the topography here. And I was also retained as a consultant with the Grand View Irrigation District and I had charge of the rehabilitation of that district.

Q. Were you State Engineer of the State of Idaho at any time?

A. I was State Reclamation Engineer of the State of Idaho for three and a half years.

Q. What is your present position, Mr. Spofford?

A. My present position, Irrigation Manager of the Owyhee Project.

Q. Would you state, very briefly, the duties which you have in connection with that?

A. In this position I am in charge of the maintenance and operation of the project. This includes the canal system of 566 miles, 120 miles of drain, 20 miles of power lines, and 90 miles of telephone lines. [643]

Q. Would you state, particularly with reference to the North Canal, what security measures have you taken that it is properly maintained?

A. In the operation of a canal the size of the North Canal, which carries 1100 second-feet at the

(Testimony of James Spofford.)

head, in my organization instructions are given to the three watermasters and the ditch riders to use extreme care in patrolling these canals during the irrigation season especially to look for new leaks or seepage.

Q. What are the duties of your ditch riders?

A. The ditch rider, during the irrigation season, which constitutes about seven months of the year, rides a section—in this particular reach of the North Canal rides the main canal between certain points, and also delivers water to a certain number of water users. Usually they serve about 3,000 acres under each beat or ride.

Q. Was there a ditch rider responsible for the area of canal in this segment?

A. That is right.

Q. And his duties—would you just state briefly what he did along that line?

A. His duties were to ride this section of the North Canal from the intake of the Malheur Siphon up the canal to what is known as North Canal 33.1 lateral, which is some three miles above the break. He rides this ditch every day, seven days a [644] week.

Q. And what are his instructions if he encounters anything which might appear to endanger the canal?

A. His instructions are to always watch for leaks and seeps and to report any of those seeps or leaks that he has seen himself or that have been reported to him by any of the farmers.

(Testimony of James Spofford.)

Q. Are you personally acquainted with the area in which the break occurred? A. I am.

Mr. Veeder: We would ask to have Plaintiffs' Exhibit 82.

Q. Are you familiar with the area directly below the canal breached which is said to be owned by Ben Shaw? A. I am.

Q. Would you state whether prior to the time the canal broke you had occasion to investigate the segment of the canal breached? A. I did.

Q. Would you state to the Court the circumstances under which that investigation was made?

A. When I took the position as Irrigation Manager I came on and took the position in April, 1944, and that summer my predecessor, with whom I was riding, called my attention to this seep in the Hust field and——

Q. Where is that located, now, with reference to the Ben Shaw place? [645]

A. That seep is located some seven or eight hundred feet south of the south line of the Ben Shaw place.

Q. And where is the location of that seep with reference to the toe of the North Canal?

A. That seep is located some six or seven feet from the toe, towards the river.

Q. Proceed with the story as to how you became acquainted with the segment that was breached.

A. During the summer the water was in the canal, and after the water was in the canal in the fall of '44, and also in '45, I examined the—tried

(Testimony of James Spofford.)

to find the cause of this leakage, which we have never been able to stop, and in making this investigation I proceeded up the canal—by the way, there is a sharp bend in the canal almost directly west of this spring—I walked up the canal around that bend about four hundred feet, and also down the canal five or six hundred feet, investigating the bottom and the side slopes of the canal, to try to determine whether there was any strata exposed there which might be opened up by scouring the canal.

Q. Would you explain the term “scouring” for the record, please.

A. Well, scouring is caused by the action of the water against the canal banks and bottom, mostly in the banks, and the most scouring or erosion is caused at the turns in the ditches, the outside turns.

Q. Scouring is another term for erosion in the side of the [646] canal, is that correct?

A. Yes, sir, caused by the water.

Q. Now, did you proceed northward and down the canal in making the investigation to ascertain the cause of the seep on the Hust place?

A. I made the investigation of the canal and down the canal.

Q. How far down the canal did you go in that investigation?

A. Oh, I forget exactly how far. There is a high bank along in this area and I went down below there, oh, seven or eight hundred feet from that turn, probably.

(Testimony of James Spofford.)

Q. Did your investigation go on down beyond where the canal broke? A. Yes.

Q. Would you describe that segment of the canal as it appeared to you in the fall of 1945?

A. In the fall of 1945 that segment of the canal was nearly straight, there was a very little curve in the canal at that point, and to the best of my investigation there was no scouring or exposed strata any place from the curve in the canal above the Hust spring.

Q. Now, that was the fall prior to the time when the canal breached, is that correct?

A. That was the fall of '45.

Q. What was the condition of the bottom of the canal in the segment where the break occurred?

A. Well, it was lined with ordinary covering of silt, seemed to be good tight silt that had washed in there.

Q. Was there anything in the canal indicating a weakness in it? A. No.

Q. Well, describe and continue with your description of that area.

A. Well, the side slopes were in place and the bottom was not scoured or eroded, and the only work that had been done in that area was the riprap in this one turn which was above that Hust spring.

Q. Would you describe the outer bank of the canal at the point where the break occurred in the fall of 1945?

A. The right-hand bank? The lower bank?

(Testimony of James Spofford.)

Q. I am speaking of the lower bank of the canal, yes.

A. The bank of the canal was—you are speaking of the outside slope?

Q. That is correct, the outside slope.

A. ———was dry.

Q. What of the evidences of seep?

A. Well, the first—you mean the first evidence?

Q. Yes. A. Of a new seep?

Q. Yes.

A. Well, the evidence of a seep depends a lot on the soil. [648] A seep naturally raises any salts that there are in the ground. In some areas it will kill vegetation within a few weeks and in other soils that do not contain the alkali, if they would occur in a cultivated field it would kill the—well, it wouldn't exactly kill, but the vegetation would turn, usually, yellow within, oh, two or three months.

Q. Now, would you describe the area below the toe of the canal as of 1945?

A. At that time the farmers' ditch, Shaw's ditch, was constructed quite close to the toe of the canal, and the operator of the place had been farming quite close up to this ditch.

Q. What was the character of the growth above the farmers' ditch, from the toe of the canal on up?

A. Well, there was no vegetation there that I have even seen or saw at that time, except the growth of some willows and a few trees along this ditch line.

Q. Where were those situated?

(Testimony of James Spofford.)

A. Along the bank of Mr. Shaw's ditch.

Q. Did you observe, in your investigation in that fall along that segment of the canal, outcroppings of porous material in the bottom or the sides?

A. No, I did not.

Q. During the spring of 1946—was a ditch rider employed in the spring of 1946 along that segment of the canal? A. Yes. [649]

Q. Are the ditch riders required to submit reports to you of any evidences of seep?

A. The ditch riders report each day during the irrigation season. May I enlarge on this point? I would like to give a little detail.

Q. All right, go into that.

A. On the North Canal the ditch riders are called into the office at seven o'clock every morning and I personally talk to the ditch riders as to their rides of the previous day and their water requirements for the next day or two, and since I have been on this job I have personally called these men or they have called me every morning that the canal is in operation and water distributed to the farmers.

Q. How do you select these men?

A. Well, these men, we try to get qualified men, and preferably men that are farmers and understand farming.

Q. Are they acquainted with the area?

A. In most cases they are.

Q. Are the ditch riders in this instance acquainted with the area?

A. Yes, the ditch rider in this instance has been

(Testimony of James Spofford.)

the ditch rider on the area since the second year after the beginning of the project, as I understand.

Q. Did you observe the field below the farmer's ditch in the year 1945? Did you personally observe it? [650]

A. Well, I noted that crops were growing on this field. I didn't see——

Q. Did you observe it in the spring of—did you patrol the canal in the spring of 1946 prior to the break?

A. Riding—yes, I have ridden on the ditch.

Q. And did you observe the field at that time?

A. Yes

Q. Was it in production at that time?

A. It was.

Q. What did you observe concerning it?

A. I didn't observe anything unusual. I often wondered how he was able to farm so close to his ditch there, which is not usual on many of the other farms.

Q. Were you notified of any seep in the spring of 1946 on the area appearing on Plaintiff's Exhibit 82—that is, the area down here, this 4.3 acres?

A. No, I was not.

Q. Were you notified of any seepage on that area at any time prior to 1946? A. No.

Q. Were you ever notified of seepage on that area? A. No, at no time.

Q. Did you observe the upper bank of the North Canal when you were making your investigation at that time, in 1945 as I understand? [651]

(Testimony of James Spofford.)

A. Yes.

Q. What did that reveal to you?

A. Well, I had noticed during the summer that there was a considerable raise in the dampness along the water line, which an operator usually thinks is a sign of a good bank.

Q. Well, did it reveal anything else?

A. This bank at that time was not as straight as it is at present. During the time of the break the canal was moved toward the hill a few feet. That was—or dressed up. It was dressed up some on account of the scour that was made by the break. There was probably a little more slope.

Q. Was there moisture in the bottom of the canal at that time when you went through there?

A. No.

Q. Would you describe the construction of the North Canal in the segment which broke?

A. The North Canal in the segment where it broke I always considered was in cut.

Q. What is the significance of the fact that the canal was in cut?

A. Where the canal was entirely in cut the high-water line is below the slope of the ground. The cut is entirely in virgin soil, in the soil in place.

Q. Does that have meanings from the standpoint of the security of the canal? [652]

A. It has.

Q. Would you describe the general practice in the engineering profession in this area in the treatment of a canal and the security measures taken

(Testimony of James Spofford.)

with reference to a canal that is cut in the manner you have described here?

A. Well, a canal that is in a cut, if there is no erosion there is nothing to be done.

Q. Is it a practice in this territory to install a core trench in a canal which is in cut, in this area?

A. No, I never heard of it being done on irrigation canals. You mean on the lower side?

Q. That is correct. A. No.

Q. What is the practice in the area with reference to lining the upper bank of a canal?

A. The upper bank of canals isn't usually lined.

Q. Would you explain why that is the practice?

A. My experience is that both banks of a canal are lined through some porous strata, like lava, sand, or material—this is concrete lining—where there will be drainage, proper drainage. My experience is that if concrete lining was placed against a solid bank you would build up a water pressure there that would be detrimental to you later. In fact, we do have one case on the North Canal where we have had that trouble and that—— [653]

Q. Would you describe that trouble?

A. Well, that trouble has been caused by freezing and thawing. The water has walled back there and it has been breaking up the concrete, and we have to repair, to caulk those joints every spring before we turn water in to the canal.

Q. What happens to the water in a canal of the character of the segment of the break when the water is taken from the canal?

(Testimony of James Spofford.)

A. Well, the tendency is to drain out towards the canal, into the canal.

Q. That is, the upper bank?

A. That is right.

Q. When were you notified of the first break in the North Canal?

A. I was notified by telephone about 12:30 on Sunday, July 14, 1946.

Q. What did you do when you were notified?

Mr. P. J. Gallagher: What time of day, a.m. or p.m.?

A. After.

Q. (By Mr. Veeder): The 12:30?

A. After noon.

Q. After noon? A. Yes.

Q. Would you state what you did when that notice was received?

A. When that notice was received I immediately drove to the scene of the break.

Q. And what did you do then? [654]

A. When I came to the scene of the break the watermaster in that district was with me and as we were approaching the place where the break had occurred we met the ditch rider, who was coming up the ditch, and we got there about the same time.

Q. Well, would you describe the situation as you saw it when you arrived there?

A. When we arrived at the break the gash through the bank was about thirty feet wide at that time, and the gauge on that day read a little

(Testimony of James Spofford.)

over 400 second-feet. That amount of water was passing through this break, down the slope, and covering some of the farm land below.

Q. Prior to leaving the office did you advise them to shut off the canal?

A. No. I looked at the break first—it is only eight miles—and at 1:30 the advice was given to shut the water off in the canal and to turn the Duniway pumps off.

Q. Then what did you do after that?

A. After that I notified Mr. Carter by phone in Boise of the occurrence of this break, and the instructions were given to proceed—instructions to the watermaster and ditch riders to proceed up the canal and open such gates as they could in order to take more water.

Q. What was the object of that action?

A. Well, this was a bad time of year, it was in the middle of summer, and the crops needed water. We were running on a five-eighths [655] delivery. The idea was that above if they could use more water during this period than the boys below we would give them a little more water to balance out during delivery.

Q. What action did you take about securing more men and machinery to effect repair?

A. Well, I knew by experience that it would take the water twenty-four hours or more to pass through this break, and I knew I could get the equipment there. I proceeded that same evening, that Sunday evening, I got in touch with the Clow-

(Testimony of James Spofford.)

ers boys and engaged their tractor, but, as I remember, the time was not definitely set when they should move until the next morning, Monday morning.

Q. What was the reason for that?

A. Beg your pardon?

Q. What was the reason for——

A. Well, their tractor at that time was at Mitchell Butte, they were levelling some little distance from the job, and they were not certain about getting a trailer. Our trailer wouldn't carry the load of the big machine. But they did secure that trailer.

Q. Did they arrive as soon as the canal was in condition so that the work could be undertaken?

A. They arrived on the job on Tuesday morning before the water had entirely receded.

Q. And what other action did you take in preparing for the [656] repair?

A. Well, Monday morning I also got in touch with Mr. Terhune and engaged his D-8 tractor; and we also reconditioned our dump trucks. In our Division we had three trucks, and I got one dump truck from the Succor Creek Division at Homedale, and also two from the Dead Ox Flat Division, which gave us a total of six trucks.

Q. What did you do concerning the securing of personnel to do the work?

A. The personnel were ordered on the job. This personnel included our own crew and several ditch riders.

(Testimony of James Spofford.)

Q. What did you observe, briefly, when the canal had drained out so that you could get into it?

A. Well, the gashes that the water cut so badly—they were scoured; it had washed clean.

Q. What was the character of the stratum that you observed in there?

A. I am no geologist, and the—the canal, I would say, was through this formation—some call it the Payette formation, or Idaho formation. It is strata of fresh water deposits of various natures.

Q. Were you there throughout the time that the repair was made, the first repair?

A. I wasn't there during all the time. There was about eighteen thousand acres affected below the break. In addition to that, [657] we had to deliver water to sixty thousand acres more land, and I didn't spend all my time on the job. Only a part of my time was spent there.

Q. When the material was cleaned out of the canal prior to the repair did you investigate the area that was cleaned out?

A. Yes. On Sunday night, Mr. Carter came over and we looked things over—of course, there was considerable water running at that time—and we decided on a general plan of rebuilding that gap that was washed out.

Q. What did the bulldozers and the machines reveal in cleaning out the canal preparatory to setting in the repair?

A. We knew by experience that we would have to use the 'dozers to excavate some kind of a trench,

(Testimony of James Spofford.)

cross trench, there, parallel to the axis of the canal, to expose firm material to make a tie for a new fill.

Q. Was firm material revealed by that excavation?
A. Yes.

Q. Were you there during the period when Mr. Gordon was making the repair?
A. I was.

Q. In your opinion as an engineer, do you think he exercised proper judgment in the character of repair that he made?
A. I do.

Q. Now, what were your instructions with reference to the flooding of water down into the canal?

Mr. P. J. Gallagher: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Will you repeat that question, please?

Q. (By Mr. Veeder): What were your instructions with reference to letting water into the canal after the repair had been completed?

A. On the morning of the 18th I was talking with Mr. Gordon about getting water down the canal and he stated that he would check this fill, and, in fact, he had an instrument and a rod there, and he and Mr. Kuhnly had checked the top of the fill, and he said he would like about twenty-five second-feet of water.

Q. And what did you do, under those circumstances?

A. And I gave instructions to the watermaster, Kuhnly, to proceed up the canal and lower some of the gates and——

(Testimony of James Spofford.)

Q. Could you explain which gates were lowered? I mean just generally, when you say lowered some of the gates, what does that mean?

A. Well, these gates are outlet gates from the canal to the laterals, and there are—the first gate that was drawing water at that time was at the North Canal 33.1 lateral and we had a sack dam at this point in order to run the water into the canal, and we had a 15-inch pipe there with the gate in order to let the water down. Well, in this trip in the morning [659] they thought they had turned down about the right amount, and in the afternoon the water hadn't reached the place, so the instructions were given for the men to go up the canal and turn down more water.

Q. When you say "turn down," does that mean that the head of water in the canal was increased?

A. No; they were turning down the lateral gates through which the farmers were irrigating at the time the break was being repaired.

Q. What was done with respect to the sand-bag dams that were in the——

A. The second time the men went up for more water they stated that they took several sacks out of this dam, and they proceeded up the canal and lowered two more gates, turning more water into the canal.

Q. Now, were you present when the first overtopping of the repair occurred? A. I was.

Q. And what did you do when you observed that situation?

(Testimony of James Spofford.)

A. When I observed that condition—do you want me to give all particulars?

Q. Well, what did you do, yes?

A. Well, my wife drove to the job with me that night and the car was parked in the orchard near Mr. Hust's, and when the water started to flow over this new bank—— [660]

Q. The repaired bank?

A. That is, the repaired bank—I attempted to walk across, and I had my oxfords on, and it was getting along toward dusk—well, I was stranded for a half an hour on the other side, and my wife saw my predicament, so I told her to go to the phone and call the watermaster, Bolitho, that the water was overtopping and to get his gang out and try and check all water back that was possible to check back by opening gates, canal gates.

Q. How long did the overtopping continue?

A. Well, I forget exactly. I must have stood there for possibly three-quarters of an hour before I got across without getting over my oxfords.

Q. Well, did you cross then?

A. I did cross. I crossed several times.

Q. Why were you able at that time to cross?

A. The bank was dry.

Q. Well, would you explain why the bank was dry?

A. The water had receded from the top of the fill.

Q. Was the recession of the water due to the

(Testimony of James Spofford.)

shutting off of the water in the canal, taking the action that you stated?

A. No; the water proceeded down the canal.

Q. It had nothing to do with the instructions that you gave, then?

A. That is right. The water proceeded down the canal. [661]

Q. Were you present at the time the second overtopping occurred? A. No, I was not.

Q. Where were you when you were notified of the second break in the canal?

A. That night, after the overtopping, I went home and went to bed, I thought we had the job licked, and the next morning, it was 4:30 in the morning—I was in my own office at 4:30 the next morning—and two of the men came in there and said that the canal had failed again.

Q. After the first overtopping how did you know that the water proceeded down the canal, that it didn't go some place else?

A. After my wife telephoned the watermaster and gave the—reported the overtopping, she came—she had to come back a few miles and come in below the break, at a point about almost a mile below the break, and proceed up the canal with the car to pick me up. She didn't know the water had subsided; she thought she had to do that. So I got in the car and proceeded back. Well, on the way back down the canal I saw the water flowing in the canal below the 36.7 gauge, which is more than half a mile down the canal from the break.

(Testimony of James Spofford.)

Q. In your opinion, was it good judgment on the part of Mr. Gordon to ask that water be released into the canal past the patch prior to the time that repair had been completed?

A. Yes, I do.

Q. Will you explain your reason for your conclusion? [662]

A. Well, at that time of year the crops of the farmers had to mature. The water was life to them and we did everything possible to get the water through that we could.

Q. What did you do when you were notified of the second break?

A. Well, I went up to the area at once, and Mr. Gordon was there, and we talked the matter of organization over and decided on the amount of equipment that we would need in the second repair, which we knew would be a lot greater than the first.

Q. Did you proceed to carry out your plan?

A. We did.

Q. Was that done immediately?

A. Well, no, because there was some water running yet that morning. There was probably four or five hundred miner's inches of water flowing at that time and we couldn't get in to work.

Q. When did the equipment arrive to start repair?

A. We started the equipment, two draglines, on the way to the job early the same morning, and in

(Testimony of James Spofford.)

addition to that we hired a second dragline from Mr. Leeburg to move his machine.

Q. In your opinion, was equipment there in time to immediately start the repair?

A. Well, as soon as practical. Now, Mr. Newell and Mr. Carter came over early that morning, and at that time of year it was hard to get dump trucks, and we, through their efforts mostly, [663] were able to get six large dump trucks out of Caldwell, with a sprinkler wagon, and in addition to that we got two dump trucks from Terteling, who was operating near Nyssa at the time, and we got two trucks from Black Canyon.

Q. When did you proceed to undertake the first repair? A. Just the second break, now?

Q. That is right.

A. Well, Mr. Gordon was on the job there, and it kept me busy trying to wrangle this equipment for the job, and the first thing to get in operation was a dragline. We had to haul a few loads of gravel on our access roads. The roads were chunky and we knew we had to have a little better roads. We got our bulldozer in to smooth the roads, to fill the holes, and before noon of the next day—

Q. Would you state, rather than “the next day,” the day on which it occurred?

A. The day after the second break. That would be the 19th. The gravel was being loaded and hauled in a stockpile near the job. At that time it was too wet in the bottom for the heavy equipment to work.

(Testimony of James Spofford.)

Q. Were you present while the material was being removed from the bottom of the canal preparatory to making the repair?

A. I was there part of the time.

Q. Did you observe the stratum in the bottom of the canal? A. Yes. [664]

Q. What did that disclose to you?

A. Well, the break was larger than it was before and it looked very similar, but naturally we were very much interested to know what had caused the second break, and we thought we found that material. In fact, there was a seam, as I remember it, on the north side of the break.

Q. The north end?

A. Well, it was the north side of the break, toward the canyon. In looking down through the break it would be on the left-hand side of the cut made by the water.

Q. What was the character of that seam in the stratum? A. Well, it seemed to be porous.

Q. And how far below the bottom of the canal was that?

A. Oh, I forget exactly. Seven or eight feet, maybe more.

Q. And what action was taken with respect to that stratum?

A. Well, we moved our big dragline in there, with the idea of cutting into that bank and trying to intersect any bad stratum that might be there, to make a good contact with this natural bank—with this bank on the north end of the break.

(Testimony of James Spofford.)

Q. Was all that removed, the whole segment of the porous stratum?

A. Well, I wasn't on the job all the time. The machine worked in there part of two days. We worked in a position so we could get by with our trucks, but the tractors were working in the bottom at this same time. [665]

Q. How much of the area, if you recall, was cleaned out in there?

A. They started to make this trench with the tractors, and after cleaning out the—well, the idea was to key in the new fill as much as possible and also to put in a cutoff.

Q. Have you an opinion as to what caused the breaks in the canal?

A. The foundation—there was a foundation blow, as near as I could tell.

Q. And would you clarify that statement?

A. Well, after the first break I felt that the cause of that break had been obliterated with the water, but after the second break we knew that there was some material there that was a contributing factor to the failure of the bank.

Q. From the standpoint of operation and maintenance, what precautionary measures should have been taken to ascertain that faulty stratum beneath the bottom of the canal?

A. I had no way of determining that it was there.

Q. Would you refer to Plaintiffs' Exhibit No. 74, and at the bottom of the lower bank of the canal

(Testimony of James Spofford.)

is what appears to be some loose material. Can you tell the Court the source of that material?

A. You mean this bank here (indicating)?

Q. The upper bank.

A. The upper bank? [666]

Q. That is right.

A. This picture was taken—when was this taken?

Q. In the spring of 1948.

A. Well, I would like to explain a little here——

The Court: No, never mind that now. Answer the question, if you can. If you can't say that you don't know anything about it.

A. That was material that was drifted from the upper bank with the Government bulldozer.

Q. (By Mr. Veeder): Would you describe that operation of drifting in the material?

A. Well, at the time of the repair of the first break we knew that that was—we found that that was the most available material that we had, fine material, for blanketing the bottom of the canal, so we sent the Government D-7 tractor up there and they stripped the brush and they worked for some time drifting that fine—sort of a fine, sandy silt into the canal.

Q. What was the object of that?

A. The object at that time was to use that material for filling the canal, to bring the canal up to grade, across the area of the new fill, where the new fill was.

Q. How extensive was that operation?

(Testimony of James Spofford.)

A. Well, they worked, as I remember, two days at that time, and later we worked for three weeks on that same bank.

Q. Subsequent to the break? [667]

A. After the break.

Q. The second break. How far did you go?

A. Well, the 'dozer—of course, we didn't work continuously on the north bank, because there were materials on the points that were not suitable for silting purposes. We worked all the way up to Sheep Creek lateral, which was——

Q. How far is that? A. Six miles.

Mr. Veeder: That will be all.

The Court: Recess until a quarter to two.

(Whereupon, at 12:45 o'clock p.m., Wednesday, June 16, 1948, a recess was had until 1:45 o'clock p.m.)

Afternoon Session, 1:45 P.M.

JAMES SPOFFORD

thereupon resumed the stand as a witness in behalf of the defendant herein and was examined and testified as follows:

Cross-Examination

By Mr. Lytle:

Q. Mr. Spofford, as manager in charge of the Owyhee Project, you have, among other duties, the

(Testimony of James Spofford.)

supervision of the distribution of water to the farmers and the regulations of the headgates?

A. I have. [668]

Q. Now, you stated that in 1944 your attention was called to the seepage of water in the Hust place. That was brought to your attention by whom?

A. By the watermaster, Bert Adams. He was acting manager at that time.

Q. Did I understand in your examination of the canal after viewing that water on the Hust place you examined the canal about five hundred feet upstream from a point opposite this water and four or five hundred feet downstream?

A. No, it about four hundred feet upstream and, oh, seven or eight hundred feet downstream, as I remember.

Q. You made that examination by going along afoot in the canal?

A. That is right.

Q. At that time did you also examine the Shaw place?

A. No. No, I did not.

Q. Did you ever go down onto the Shaw place and go over any part of that afoot looking for seepage?

A. No, I did not.

Q. Was there ever any report made you of seepage in the coulee just north of the field shown in Exhibit 82?

A. The water in the coulee in the Shaw place north of where the break occurred, oh, possibly four hundred feet, of course that has run for a

(Testimony of James Spofford.)

long time. That is where all that vegetation is there.

Q. When were you first informed of that? [669]

A. Well, that is very noticeable from the canal bank.

Q. Will you please answer my question? When were you first informed of that leak?

A. That seep was called to my attention in the summer of '44.

Q. That has continued since that time?

A. Yes.

Q. Now, is it not a fact that that seep runs throughout at least a period of the year in the spring and fall when there's no water in the canal?

A. Possibly it does.

Q. Have you ever been along there in the spring to look for it?

A. No, not that place in particular.

Q. Have you ever made an examination there to determine the period of time when that seep runs?

A. Well, that seep hasn't worried us——

Q. I am not asking you if it worried you. I am asking you if you have ever made any investigation to determine——

A. No, there has been no complaint in regard to that seep.

Q. Again I ask you if you have ever made any investigation to determine what seasons in the year that seep is running? A. I have not.

Q. When you went down the canal investigating

(Testimony of James Spofford.)

the canal to find the source of the leak on the Hust place did you go as far north as to cover the section of the canal included in the [670] break of 1946?

A. Yes, I would say I did.

Q. And at that time you knew of the leak or seepage in the coulee about four hundred feet north of the field shown in Exhibit 82?

A. That is right.

Q. As you examined the canal you found no evidences of leakage in the bottom of the canal?

A. I did not.

Q. You found no evidences of leakage in the outer bank of the canal?

A. This one leak that was there, yes.

Q. I mean in the canal itself?

A. No, nothing in the canal itself.

Q. Yet those leaks existed at that time? That is, there was water coming out of the toe of the outer bank at that time?

A. It showed in that ravine close to the toe.

Q. Yes. Then what investigation did you make, if any, to determine if that water was coming from any other source along the canal?

A. I made no further investigation.

Q. You made no investigation into the mountain side bank of the canal?

A. I did not.

Q. Now, as a matter of fact, about all the view or investigation [671] you made of the Shaw place to determine whether any of that ground was seeped was as you rode along the top of the ditch bank in a car and observed it as you passed?

(Testimony of James Spofford.)

A. That is right.

Q. I believe you stated you went along there in the spring of 1946? A. I did.

Q. And on that occasion, when you say you observed no evidence of seepage in the Shaw field, that was the time when you rode along the ditch bank in a car? A. That is right.

Q. You stated that it is unusual to line the upper or mountain side of the canal.

A. That is right.

Q. That would depend largely upon the nature and character of the strata exposed?

A. The only lining that I know of is where it is sandy ground, gravelly ground.

Q. Well, then would it not be determined—the advisability of lining the mountain side bank of the canal would be determined by the character of the soil that was exposed? A. That is right.

Q. And you do have sections of the canal, both upstream and downstream from the point of the break, where the mountain side bank of the canal is lined? [672] A. We have some sections.

Q. Both above and below?

A. That is right.

Q. At the time of the first break your gauge readings showed what rate of flow in the canal at the point of the break?

A. The closest gauging station is at 36.7, which is less than half a mile downstream from the break,

(Testimony of James Spofford.)

and the morning of the break that registered 417 second-feet.

Q. Four hundred seventeen. How many turn-outs are there between that gauging station and the place of the break?

A. There is one small turnout.

Q. Whose ground does that serve?

A. That serves Mr. Shaw's ranch.

Q. When water is turned out of that headgate what amount is received?

A. Well, a maximum of about a second-foot.

Q. Do you know if that headgate was receiving a second-foot or any amount of water at the time of the break?

A. No, I don't know.

Q. What?

A. I don't know.

Q. You don't know. Well, in any event, there would be 416 second-feet in the canal at the section of the break at the time of the break?

A. That is right. [673]

Q. Upon being informed of the break, who gave instructions to go up the canal and shut down the water?

A. I gave the instructions.

Q. To whom?

A. To the watermaster.

Q. Well, who is he?

A. Mr. Bolitho, William Bolitho.

Q. Bleichhold?

A. (Spelling) B-o-l-i-t-h-o.

Q. Oh, Bolitho. And you instructed him to go to a certain point?

A. I advised him to go up the canal above the

(Testimony of James Spofford.)

break and open up and adjust the lateral gauges so that they would take more water out of the canal for the water users served from the canal above the break.

Q. Any steps taken to turn the water out of the canal at any other works?

A. Not except at the head of the dam. The Superintendent of the Owyhee Dam was immediately notified to turn out 500 second-feet of water, cut back that much water.

Q. You mean cut back 500 second-feet?

A. That is right.

Q. And where would that be cut back?

A. At the Owyhee Dam.

Q. How many miles above this break? [674]

A. About thirty-six miles.

Q. How long would it take the cutting back of 500 second-feet at the dam before it would be reflected in the flow at the break?

A. At least twenty-four hours, between twenty-four and thirty hours.

Q. And that was the only means taken to reduce the amount of water in the canal, except what was turned out at these gates?

A. It is possible that we might have taken out 75 second-feet at the intervening gates. There are some thirty-odd gates above the break.

Q. The intervening gates? A. Yes.

Q. Now, intervening between what points?

A. Well, intervening between 15.6 and the break, or fifteen miles up the canal, about fifteen miles.

(Testimony of James Spofford.)

Q. How long would it take before the difference in the head would be reflected between the upper gates and the point of the break?

A. Well, the way the gates are regulated, there would be a gradual reduction only in that amount.

Q. Yes, but approximately how long would it take to——

A. Well, I imagine it would take, oh, ten or twelve hours before all that reduction would be noticeable at the break.

Q. Now, as I understand, the cut following the first break, [675] the bottom of the cut, was considerably lower than the normal line of the bottom of the canal?

A. That is right.

Q. About how many feet?

A. I would think nine or ten feet,—that is, the very outer lower slope of the cut.

Q. Yes, the breakover——

A. That is right, towards Mr. Shaw's ditch, down in there.

Q. Yes; and that showed a series of strata of sand and gravel and sandstone?

A. That is right.

Q. Those strata were disclosed from almost immediately below the bottom of the normal bottom of the canal right down to the bottom of the cut?

A. That is right.

Q. You say Mr. Carter came over that evening and you and he discussed the general plan for the repair?

A. That is right.

(Testimony of James Spofford.)

Q. And the repair was made on the basis of that plan as you and he discussed it?

A. That is right.

Q. Now, what exploration, if any, did you make at that time to determine the cause of this break?

A. We were unable to make any determination, on account of the water. Practically the full head of water was still running [676] then.

Q. Well, then, you made no exploration at that time? A. That is right.

Q. And you adopted your plan of repair——

A. That was to put in a core.

Q. ——when the water was in the canal and running down through the cut to the extent that you could not make any exploration?

A. That is right.

Q. After the water ceased running out of the cut what exploration did you make to determine the cause of the break?

A. I made no particular investigation. We had the equipment on the job, and the equipment we knew would open up the material. The idea was to go down to a firm foundation with a trench, which we attempted to do.

Q. What exploration did you make either above or below the cut caused by the break to determine whether or not the structure above or below had been weakened? A. I made no investigation.

Q. You made no investigation. Now, on the morning of the 18th, just what was the extent of the repair made at the time Mr. Gordon directed

(Testimony of James Spofford.)

that a head of water be brought down the canal?

A. Mr. Gordon had a level rod and he had taken elevations of the top of the new fill in the break, and he told me that [677] the fill was of sufficient height so that it would be safe for us to turn down 25 second-feet of water.

Q. Do you know what the elevation of the fill was with relation to the elevation of the normal water level in the canal?

A. I couldn't say exactly.

Q. Approximately?

A. It was about the normal water level.

Q. Yes, it was about that.

A. Yes, that is right.

Q. You then instructed someone to go up the canal and open some gates? A. I did.

Q. How many gates were opened?

A. The gates—the first gate opened was at 33.1 lateral,——

Q. Yes.

A. ——and possibly two others up above that. Three gates—there were three gates that were turned down with the idea of getting sufficient water to come through.

Q. Those three gates had been opened to almost maximum capacity in order to reduce the flow in the canal, is that right?

A. Those gates—the record of the delivery through those gates is official record in my office.

Q. Yes. Well, do you know what was being turned down at those [678] gates?

(Testimony of James Spofford.)

A. At that particular time the head of water had been lowered to the extent that there was not over 12 feet, 10 or 12 feet, of water.

Q. What was the nature of the structures, if any, in the canal at that time above the break?

A. The first dam was at 33.1 lateral, and then there were two smaller dams above this lateral. There were three small dams in the canal, that is, sack dams.

Q. Was there a cofferdam or a plug above the point of the break? A. Yes.

Q. And what was the condition of that at the time water was ordered down?

A. At the time there was very little water in this cofferdam.

Q. You mean above the cofferdam?

A. Above the cofferdam, yes.

Q. All right. Now, how high was the cofferdam built?

A. I couldn't answer that exactly. I think——

Q. Would you say the cofferdam was built up to the height of the normal water level in the canal?

A. Yes, I would think it was that high or maybe a little——

Q. Or higher.

A. Maybe a little higher.

Q. And back of that, or above the cofferdam, what would you say [679] was the depth of the water?

A. The depth of the water above that dam—you mean the highwater depth?

Q. No, as it stood at that time, at the time the

(Testimony of James Spofford.)

men were ordered up to turn down some water?

A. I couldn't tell exactly. It wasn't full. I wouldn't imagine that it was over four feet there at that time.

Q. And the normal water level would be what, how many feet?

A. Well, about—it would be over six feet.

Q. And all the water that was turned down at that time amounted to about 12 second-feet?

A. Yes.

Q. Did you observe what, if anything, happened to the cofferdam just before the first overtopping?

A. Yes, I was there at the time.

Q. What happened?

A. Mr. Gordon opened that cofferdam with a shovel and let the dam disintegrate.

Q. And that was about four feet—the water was about four feet in height back of it?

A. No, at that time more water had come in. When we sent up for the water was 9:00 o'clock in the morning, and this was, oh, about maybe 7:45 or 8:00 o'clock at night when Mr. Gordon broke the dam.

Q. And at that time there would have been added a flow over a [680] period of time of 12 second-feet?

A. Well, that water had been increased. At the time the dam was broken I believe that the water was probably up to a depth of between five and six feet.

(Testimony of James Spofford.)

Q. To a depth of approximately a foot below the natural water level in the canal?

A. I would say about, about that.

Q. Yes; and also about a foot below the crest of the new fill? A. That is right.

Q. Then as the water came through the cofferdam I presume it flowed on down the canal?

A. No, as the water came through there it just disintegrated quite fast——

Q. What do you mean? As the——

A. Well, it came through with a surge, more or less of a surge, and the water sort of piled up, as you might say, and raised up a little over the height of the fill.

Q. Was that over the entire fill, or only the northern end?

A. Well, I would imagine it—I believe that the water passed over a crest of possibly thirty feet of that new fill.

Q. At the time the water came through at the occasion of this first overlapping how much below the natural level of the bottom of the canal, the normal level, was the bottom of the canal then?

A. The bottom of the canal had been somewhat filled and [681] possibly it had not been brought up to grade, I know that, entirely, but exactly what the condition was——

Q. Quite considerably below grade?

A. Well, I couldn't determine that exactly. Probably it might have been a couple of feet below

(Testimony of James Spofford.)

grade,—more or less. Now, I couldn't state at this time.

Q. Now, after this first overtopping what was done to stop the flow of the water coming down the canal?

A. Well, I stood there at the time the water overflowed on this new patch, overtopped it, and the water receded before I left and the water passed down the canal. I went back down the canal and went home.

Q. Do you know if the cofferdam was rebuilt?

A. Yes, the testimony——

Q. What efforts were being made to stop the overflow of the new fill before you left?

A. They were replacing the cofferdam, putting in another cofferdam, at that time.

Q. And had that been replaced before you left?

A. No.

Q. They were in the process?

A. That is right.

Q. Now, do you know what caused the head of water which later disintegrated that cofferdam?

Mr. Veeder: I object, your Honor. The witness said he was [682] not there at the second overtopping, and there is no testimony from the witness at all on the subject.

Mr. Lytle: I think the question calls for a Yes or No answer, your Honor.

The Court: Well, he may answer. If he doesn't know, he can say so.

A. I would like the question again.

(Testimony of James Spofford.)

The Court: Read the question.

(Pending question read.)

Mr. Veeder: That was the second cofferdam, is that it?

Mr. Lytle: Yes.

A. No.

Q. Had you at that time or later that night ordered any more gates closed or any other means carried out to bring additional water down the canal?

A. Yes, the order was given, as I remember it, about 3:00 o'clock that afternoon.

Q. To whom.

A. It was given to one of the watermasters.

Q. What watermaster? A. Mr. Kuhnly.

Q. What was he directed to do?

A. He was directed to go up the canal and turn down more water. There had not been sufficient water that came down the canal. The canal was tried out and there was not sufficient water [683] there.

Q. And what would he do to accomplish that purpose?

A. Well, he would continue up the canal and turn down more gates, with the idea of getting an additional 25 second-feet of water to that that was in the first order.

Q. Had there been any means taken, other than the opening of the gates to laterals, to retard the flow in the canal? A. Yes.

(Testimony of James Spofford.)

Q. What were they?

A. They were some checks at Sheep Creek Siphon and radial gate at Lockett Gulch.

Q. Well, now, what had been done at Sheep Creek Siphon to retard the flow down the canal, or diminish the flow down the canal?

A. There had been some checks put in the canal.

Q. Describe what you mean by checks, how that was accomplished.

A. The check-boards in that structure, in that bulkhead at the intake of Sheep Creek Siphon, are 4x6s, about 9 feet long, and there had been some checks put in that structure.

Q. Do you know how many? A. No.

Q. Who put them in?

A. They were put in by the watermasters and ditch riders under instructions from me.

Q. Yes. Then who, if anyone, went up the stream? Was it [684] Kuhnly?—or went up the canal, or stream?

A. Mr. Percy, with Mr. Pettet, went up the stream.

Q. What had been done at Lockett Gulch to diminish the flow?

A. The radial gates at Lockett Gulch were closed down.

Q. Is there a waste-way at that point?

A. There is a waste-way, constructed at that point.

Q. Was the waste-way gate open?

A. No, it was not in operation.

(Testimony of James Spofford.)

Q. Pardon? A. The gate was closed.

Q. And so there would be no wasting at that point? A. That is right.

Q. What instruction did your watermasters have as to what they should do at Lockett Gulch?

A. The instructions at that time were for them to turn down an additional 25 second-feet.

Q. You would not know, of course, of your own knowledge, just what they did do? A. No.

Q. Did you make inquiry later to determine how many of the splash boards they had taken out of Sheep'shead? A. Sheep Creek?

Q. Yes. A. Yes.

Q. How many? [685] A. Two.

Q. Before they got to Lockett Gulch—or, rather, to Sheep Creek Siphon and to Lockett Gulch, how many gates would they have closed?

A. I believe, counting the small—there are three main laterals there, and the other was a small gate—the total, I believe, was eleven.

Q. And how much water would be held back in the canals by closing the three laterals?

A. I don't understand that question exactly.

Q. Those three lateral gates were open, were they not? A. Yes.

Q. When you closed those three gates how much water would be retained back into the canal?

A. Oh, probably—at that time I believe the record shows it to be in the neighborhood of 18 feet, something like 18 second-feet.

Q. Eighteen second-feet? A. Yes.

(Testimony of James Spofford.)

Q. And how much water would be retained in the canal by closing the other eleven headgates?

A. Well, those are three of the eleven. There are eight others.

Q. I mean the other eight, Mr. Spofford.

A. Well, those are smaller diversions,——

Q. Yes. [686]

A. ——as low as a second-foot. I don't think that they could have developed over 25 second-feet in all the gates.

Q. In all three? A. In all eleven.

Q. Yes. That would be plus the additional water that came down by removing the splash boards at the Sheep Creek Siphon and by opening the Lockett Gulch radial gate?

A. The stream in the canal had lowered a lot when they went up. It was nearly completed. In other words, that 25 second-feet they put in in the morning had dribbled out to just a few second-feet. I would imagine that it could not any more than have double that amount by the time it got back to— Sheep Creek Siphon is located about six miles above the break and Lockett Gulch about two miles farther up, and naturally the water would level down, and in my estimation I wouldn't think that there was over 50 second-feet that was approaching the break, from the records, my calculations on the records of delivery.

Q. Now, you had 1100 second-feet at the head of the canal? A. Not at this time.

Q. Had there been a further cut at the dam?

(Testimony of James Spöfford.)

A. The capacity of the canal at the head is 1100 second-feet, but there was 500 second-feet that had been ordered off, so there was about—there was less than 600 second-feet at the head of the canal. [687]

Q. What was the capacity at Lockett Gulch?

A. The capacity of Lockett Gulch is rated at, I believe it is 560 second-feet.

Q. And approximately the capacity head was coming down from Lockett Gulch?

A. No, that was when we were turning in 1100 second-feet. That is the capacity of Lockett Gulch Siphon, the rated capacity.

Q. Let me get this clear: Each of those smaller gates had a capacity of approximately a second-foot? A. Yes.

Q. And the three laterals had a capacity of 18 second-feet?

A. They were running about that, yes.

Q. All of the water that went past Lockett Gulch was turned down and would come down to this break?

A. With the exception of one turnout, and that was the first turnout below Lockett, and from the report that I got that gate was not closed.

Q. Was not closed. Now, you state that in your judgment Mr. Gordon used good judgment when he ordered a head of water sent down; am I correct? A. That is right.

Q. You predicate that more upon the desirability of getting water through the canal for service

(Testimony of James Spofford.)

to the farmer below than upon 'most any other consideration, do you not? [688]

A. Well, we wanted to operate safely. At the same time, we knew that this ground was burning up for the lack of water.

Q. There was a high demand for water at that time?
A. That is right.

Q. And your chief purpose as manager was to get this water through just as fast as you could?

A. And safely.

Q. Was it upon your request and your bringing up the subject to engineer Gordon that he stated that it might be advisable to let down 25 inches?

A. Twenty-five second-feet?

Q. Or 25 second-feet?

A. I didn't get that question.

Q. Was it at your request or his that that——

A. Oh, at my request.

Q. Yes. And he acquiesced in that request?

A. That is right.

Q. Now, in the course of your operations as manager I presume you had, from time to time, examined and looked at the banks of that canal along in this area?
A. That is right.

Q. At the section of the bank where the break was involved, had that been lined prior to the break?

A. No. The only lining was riprapping above—on the curve above the Hust seep and below, probably,—oh, seven or eight [689] hundred feet below the break.

(Testimony of James Spofford.)

Q. And there had been no lining at the point of the break? A. No particular lining there.

Mr. Lytle: That is all.

Redirect Examination

By Mr. Veeder:

Q. In your opinion, Mr. Spofford, did the overtopping of the water prior to the second break have any relationship to the break?

A. Not to my knowledge.

Q. In your opinion, did it have any casual relation with the second break? A. No.

Q. What was the effect—you were standing there—what was the effect of the overtopping on the repair?

A. The overtopping probably cut, oh, possibly three inches of loose dirt over the top of the new fill, cut it off and washed it away.

Q. Are there water users between Lockett Gulch and the outlet of the Owyhee Dam? A. Yes.

Q. Were they receiving water at that time?

A. There was 40,000 acres receiving water from the main canal above the break. [690]

Q. How much do you believe that diminished the 500 second-feet that were available at the dam?

A. During the time of the break—and we probably were overcautious; at times maybe we didn't get enough water through—but we did not serve all the people above the break and, in fact, there was some damage claimed because they didn't get

(Testimony of James Spofford.)

the water, but we didn't want to get the water down on that new fill when they were in operation.

Q. How far is the coulee north of the Ben Shaw place from the place of the break?

A. Three or four hundred feet.

Q. Would you step to Plaintiff's Exhibit 82 and locate again the farmer's ditch? I think it is Exhibit 82, there at the bottom. Is it located properly as drawn on there by the witnesses of the plaintiffs?

A. Well, it isn't entirely to scale.

Q. Well, I mean approximately?

A. It is approximately.

Q. Would you say that that ditch on there, Ben Shaw's ditch,——

Mr. Lytle: I object to this as not proper redirect. We did not go into any of this matter on cross-examination.

The Court: Objection sustained.

Mr. Veeder: We would like to have the privilege of asking that question on direct, if your Honor please.

The Court: Oh, this is all cumulative. That is denied. [691] It has been covered three or four times by other witnesses.

Mr. Veeder: We have nothing more, your Honor.

Mr. Lytle: If your Honor please, I would like to ask the indulgence of the Court for the privilege of asking this one question that probably should have been asked on cross.

The Court: What is the question?

(Testimony of James Spofford.)

Recross-Examination

By Mr. Lytle:

Q. How long a period of time was the water off?

A. The water was off entirely from about noon Sunday the 14th until the 23rd, and we got some water past the break that morning, about 40 second-feet as I remember, and we gradually built that water up in the canal and we reached the full head about the 30th of the month, as I remember.

Q. Now, the 40 second-feet that went past the break down the canal, was that served to the farmers in line on the canal, or was that carried clear through to the north end of the canal?

A. That is right, it was left in the canal.

Q. How many miles, approximately?

A. About thirty-five miles.

Q. And how soon after you had the first break repaired was it before you ordered the full head in at the head of the canal?

A. Well, we kept stepping the water up and it took until about the 29th before we had a full head of 1100 second-feet at the [692] head of the canal.

Q. But after the repair of the break you stepped it up from time to time?

A. No, this was the second break. I misunderstood you,—the second break.

Q. I am asking you about the first break.

A. No, we put an order in for 100 second-feet of water, and that order only lasted about six hours;

(Testimony of James Spofford.)

we ordered it off, and the water never got through on that order.

Mr. Lytle: That is all.

(Witness excused.)

Mr. Hess: Call Mr. Clowers. [693]

WILEY A. CLOWERS

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Your full name?

A. Wiley A. Clowers.

(The Witness was thereupon duly sworn.)

Direct Examination

By Mr. Hess:

Q. Where do you live, Mr. Clowers?

A. At Madras, Oregon.

Q. And what is the nature of your business, Mr. Clowers?

A. It is a dual business: farming, individually; and, in partnership with my brothers, land leveling and earth moving, earth work construction.

Q. And what is your age?

A. In the Madras area at present.

Q. Your age, please? Your age?

A. Thirty-five years old.

Q. With whom are you associated in the construction or earth-moving business?

(Testimony of Wiley A. Clowers.)

A. With my brothers, Allen and Philip Clowers.

Q. Were you here in the Ontario country during the time of the break of the North Canal of the Owyhee Project in the year 1946?

A. Yes; I lived at Nyssa and worked in the Nyssa vicinity. [694]

Q. Were arrangements made with the Project officials for you to do work upon that break?

A. Yes, there were.

Q. And when were the arrangements completed, and with whom?

A. The arrangements were completed on Tuesday, during the day,—I disremember the exact hour,—but with Mr. Spofford. I believe it was before noon, however. We were asked to stand by the evening before in the event that we were needed, so that it would not be a complete surprise.

Q. So if what?

A. So that if we were needed it would not be a complete surprise.

Q. Oh, I see. That was on Monday?

A. No; the first standby was on Sunday.

Q. Oh, the first standby was on Sunday?

A. That is right.

Q. Arrangements were made with you on Sunday, the 14th?

A. No, no arrangements were made. It happened that we were talking with Mr. Spofford and he said for us to stand by with any equipment in the area.

Q. That was on Sunday, the 14th?

(Testimony of Wiley A. Clowers.)

A. That is right.

Q. And what equipment did you have in this area?

A. A D-8 Caterpillar and 'dozer.

Q. And when did you take that equipment on the work?

A. I believe it reached the work early on Tuesday morning [695] following the break.

Q. What condition was the floor bed of the canal in then?

A. It was as the water had eroded it, eroded some—well, since I didn't measure it, some two or three hundred feet upstream and above a hundred feet or so, between a hundred and two hundred feet, downstream.

Q. When did the Terhune Caterpillar get there in connection with the time yours got there?

A. That I don't remember, sir.

Q. Was it there before or after?

A. Even that I couldn't say. I helped deliver our Caterpillar there, but didn't do the first shift on the cat.

Q. Was the cat running more than one shift?

A. Yes, the cat was running the three shifts in the day when there was any work for the Caterpillars to be doing it.

Q. And who operated it?

A. I operated one-third of the shifts.

Q. And who operated the other shifts?

A. My brothers. We operated six hours on and the other eighteen hours off.

(Testimony of Wiley A. Clowers.)

Q. What equipment was there there at the time you first began?

A. At the time that I began, the two Caterpillars and other equipment.

Q. Were there any trucks there at that time?

A. Not at the first break. The first few shifts we had to [696] clean out the break and the floor before any trucks could get into the area.

Q. Did the Project have a Caterpillar there, too?

A. Yes, that I knew. However, at the immediate time we saw it to and from our way to work it was doing all preparations necessary to receive trucks and equipment on the job.

Q. From what appeared to you, could you have gotten into the canal and worked in the canal with your Caterpillar prior to the time you did?

A. No; it was as early as was possible.

Q. And tell the Court what you did there with the Caterpillar and of what the operation consisted, just how it was carried on. Just tell the Court in your own language.

A. We were given our general instructions prior to beginning our shift on the Caterpillar by Mr. Gordon, while the other operator was still working, the reason for that being that it would save time in the Caterpillar's operation, which was of importance, since only two machines could work in the area, being confined as it was, and every hour it could work, of course, speeded up completion. So after those general instructions were given we proceeded with the part of them that might succeed whatever part was to be done, and which mostly con-

(Testimony of Wiley A. Clowers.)

sisted of sloping down the two banks, cleaning the inside portions of each lower bank, cleaning the floor of the canal and the area of the break, the floor down through the [697] break, scraping down such materials as was possible to scrape off of the upper, and only the upper, bank, the construction of such roadways as were necessary down the side of the bank, which were not in existence, and the stockpiling of material from the inside. I believe that covers just about the total of the early part of the operation. Those were the different steps.

Q. What did you note in regard to the condition of the banks, the insides of the banks, of the downstream bank?

A. Well, in our instructions, after the banks were sloped down and we were taking the dirt from the inside of the canal, on the inside of the lower bank both above and below the break, we were instructed to cut the dirt out and into the bank until firm, hard material were reached, and if at any time we reached any other than the ordinary wet material found inside the ditch at any point we were to report it and, if not, simply to clean out and straighten out the bank, as it was left pretty—the lower bank was left pretty well eroded by the stream of water that flowed out after the break. But, at any rate, those were our instructions, to clean out any loose material or any wet material until we were sure that we were in safe, hard material and at that time call it to Mr. Gordon's attention. He passed inspection on each one of them before we finished.

(Testimony of Wiley A. Clowers.)

Q. State whether or not you would cut down—how you cut down on the floor of the bank and leveled it off to strata that [698] had been washed down through the bank and exposed by the erosion.

A. We went back upstream as far as the erosion had taken place and with the 'dozer cut off all loose material or material that we could cut off. We couldn't cut very deeply, because we could only just get the edges of each step in the stratum, because the stratum was rather thin stratum, or rather, six inches to a foot at the most, and stepped as the water had eroded it, and we took that excessive dirt out, out through the opening of the break, into the stockpile. Then near the area of the break we took out all material that we could cut with the 'dozer blades, the remainder being so hard and firm that we could not move it.

Q. And then after that repair was made I will ask you as a dirt mover if this all appeared sound after all of the wet material or any of the loose material in the bottom was completely cleared and to both ends, as far as it could possibly be reached, on the lower, downstream side of the break and on the upper side of the break?

A. Yes, it did, in as much as we had used both slopes of the bank to back up for the material and mixing and blending the material in the fill. We didn't slope the banks down any more gradual slopes than was necessary to back the Caterpillars back up the slope, hence they were rather steep and we were able to back up without trouble in high reverse.

(Testimony of Wiley A. Clowers.)

Q. And then how did you build the bank,—that is, to fill the [699] break?

A. As I remember, the first material that put in the fill was put in the core trench by dragline, pick and shovels, and, of course, we compacted that and helped to blend it, which was gravel and dirt and the mixture that came in from part of the spoil of the old bank, that was taken to the spoil pile, and then, as I remember, one of the Caterpillars during the operation at all times was bringing in spoil material which was blended to some extent and added to gravel pit-run that was dumped on the top of the north bank, that being brought on down with the Caterpillar and mixed with the spoil material and compacted by both cats by running repeatedly back and forth across them as the fill was being made.

Q. Were you there when the first water was turned down, or the first—were you there when the first overflowing of water over the bank took place, when the cofferdam was removed or opened?

A. No, I was not.

Q. Did you observe that when you came on your shift, after it had been over it?

A. Yes, when I was called back out, as I remember, about 11:00 o'clock, between 11:00 and 11:30, since the water had overtopped we were afraid to cross the draw north of the Shaw place, so I brought my truck in from the north way across the canal bank—it is about, as I remember, three-quarters of a [700] mile or a mile down the road to the north of

(Testimony of Wiley A. Clowers.)

the bank, hence in parking my truck I parked it on the north side of the eroded draw, or the place where the break happened, and ran on down the hill, and, in walking up, instead of going down the roadway I just cut across to my cat, which was parked on the south side of the patch, and in so doing I crossed over the face of the patch on foot, with a flashlight; so I did cross it and observe its condition.

Q. And was there any part of the blended material in that bank that had been washed away,—that is, the blended portion of the material over the top of the bank?

A. It showed the evidence that water had run across it, but no perceptible amount of material had been washed down; it did not disintegrate the bank at all.

Q. Then what did you do after that? Did you keep building up the bank, or what was done?

A. No, my purpose in being called back was to be on hand if any eventuality should arise. I started the Caterpillar, and Mr. Gordon then told me that he was expecting water to come on down enough to overtop the little cofferdam which was placed in earlier in the evening, and that I was to be on hand so that when that overtopping came if any action of the Caterpillar were necessary that I would be there to do so.

Q. Well, were you there?

A. Yes; I had the cat started and running, with its lights on, [701] parked just above the cofferdam.

Q. And that was about what time?

(Testimony of Wiley A. Clowers.)

A. Well, in accurate minutes I couldn't remember. It was somewhere between the hours of 11:30 and 12:30, I would estimate, perhaps not even quite so late. There was no particular need at the time of knowing the hour, and I never was able to ascertain in my own mind just exactly what moment it did happen.

Q. All right, then what did you observe there, if there was a second overtopping that you saw,—what did you observe?

A. Well, I stayed at the cofferdam until it washed out part way, and then got on the Caterpillar and drove down across the patch, or on the patch, to nearly its center, and sat there and just waited and watched the water build up in the canal, and when it started to overtop Mr. Gordon waved to me to bring dirt, since it was only overtopping a small area, and I backed off the new patch and picked up some of the old bank that was there on top and brought it across to start building up more free-board above the water line, which I did until I had it stopped, and as I completed my last load of dirt I backed up just enough to see—the lights are set on a Caterpillar so that you can't observe directly under your tracks very well, you have a not too clear picture of what is under there if you are doing dirt work ahead, and I was forced to back up some twenty feet to be able to get my lights on the area I had just delivered my dirt to. [702]

Q. Well, what did you observe there on top of the bank or otherwise?

(Testimony of Wiley A. Clowers.)

A. Well, there was nothing to observe except water on one side and darkness on the other.

Q. How deep was that water?

A. To the best of my knowledge, it was approximately a foot and a half to two feet, perhaps more than that, blow the top of the bank by that time, because it was beginning to recede. At any rate, I sat there awaiting further direction from Mr. Gordon.

Q. Well, did the overtopping do any noticeable damage to the bank at all?

A. Well, it couldn't do any damage, because the bank comes at the area of the first erosion, or top, and I was able to drive the Caterpillar on across the top of the bank without having to worry about the width, and the Caterpillar is a little over eight feet wide, the tracks, and, as I remember, it still retained its original width, or nearly so.

Q. And then did you observe something later, after the water had subsided?

A. Yes, the thing I remember mostly was observing frantic efforts on Mr. Gordon's part to attract my attention, because I was not observing much of anything because the water seemed to be going properly and I was just awaiting orders to go home, because I thought there was nothing to do. He [703] started to waving frantically and I got off the Caterpillar and went up to see what he wanted, because I could tell by his repeated flashings of light out to the side of me somewhat and out in the ditch, so I went up to see what he wanted me to see, and I then

(Testimony of Wiley A. Clowers.)

went back to my Caterpillar as fast as I could. There appeared to be something like a whirlpool, or it looked like the inside of a horn as you would look at it, the righthand side——

Q. Where was that?

A. Well, it would be an estimate,—it seemed to me just to be near the center of the canal and perhaps six feet or so from the bank and just ahead of where my cat was setting perhaps fifteen or twenty feet. The whirlpool was at the water's surface.

Q. Now, how much time was that between the time you had repaired the top of the bank from the second overtopping until your attention was called to that?

A. I couldn't say. Perhaps it wasn't very long. It couldn't have been any more than five minutes to ten at the most, for if it had been any longer than that I would have gotten off the cat to go ask for instructions.

Q. And how long had you been working on the cat prior to that, repairing up above on account of this overtopping?

A. Oh, I don't believe I worked in making the repair more than fifteen minutes at the most. Most of my time was spent at the [704] cofferdam, just waiting for it to go out.

Q. All right, then what happened after you got the cat out?

A. Just before I started to taking it out I, of course, was wondering what caused the vortex or

(Testimony of Wiley A. Clowers.)

whirlpool, and in the lights, on the right-hand side down toward the lower part of the bank, I could see where the water was coming out, and of course that scared me so much that I thought the best thing to do was to get the cat out as fast as I could and so I took it back past center, back up above a part of our original patch, and then I got out and went forward down the patch to see what was going on, and of course by that time the point where my cat had been setting, or slightly ahead of that, it had gone out and the water came in there, but the water had started coming out on the bank, I would say quite a bit below the floor of the canal, of the ditch; I wouldn't know how much, but pretty well down to the toe or the base of the lower fill of the bank.

Q. And was that below the bottom or north of where you had made your first patch?

A. It was north of it, yes, quite a ways. In fact, its trenchway made into the old fillway or old washway made a sort of a fork or wye as it came back in, which was visible there until we filled it up with muck and spoiling.

Q. In your opinion, was that second break any part of the first break? [705]

A. Well, I couldn't say—

Mr. Lytle: Object to that as the witness not having shown himself qualified.

The Court: Objection sustained.

Q. (By Mr. Hess): From your observation as a dirt mover, a mover of earth and contractor, state whether or not there was as much machinery and

(Testimony of Wiley A. Clowers.)

equipment in there from the time of your first break, and when you were in there operating, and all during the time of the second break, as could be efficiently used in that operation?

A. Of course, I can only speak from how well we were supplied with materials and the amount of work we could do in the area where I worked, but I don't believe that any more Caterpillars could have been employed, and I know that we were never short on gravel or any other material for making our compacted fill. I don't believe that any more equipment could have even gained any time. I believe that it would have held up those that were there enough to more than offset its advantage.

Q. And state whether or not everyone was instructed and was working as continuously and as fast as the operation could take?

A. Yes, our instruction was efficient, and then I believe the attitude on the part of workers was to get it finished, as we were all residents of the area.

Mr. Hess: I think that is all. [706]

Cross-Examination

By Mr. P. J. Gallagher:

Q. Mr. Clowers, when you finally began to bulldoze this earth away how far did you cut the bank back south of the first break there?

A. At what point, the bottom or the sides?

Q. Well, let's take the bottom. How wide was the bottom of the V-shaped cut there when you first began to work?

A. You mean—I don't get you fairly, sir.

(Testimony of Wiley A. Clowers.)

Q. Well, as I understand, there was sort of a V-shaped cut there where the water went out at the time of the first break.

A. You mean at the point of the break itself?

Q. Yes.

A. Yes, I understand that now. That point was cut out by my brother before my arrival there. However, I was able to see it after it was cut out.

Q. How far out on the south bank did you cut that?

A. Estimates only, about twenty-five feet.

Q. And how far did you cut the north bank away?

A. Nearly the same amount.

Q. What was the total over-all width between the two banks when you finally got through cutting away the debris in that area?

A. About sixty-five or seventy feet, I believe, was opened up for a keyway. [707]

Q. And those two banks you cut away immediately north and south of the break, those were cut away because they were too wet to tie into?

A. I don't know the purpose, sir. I do know the material that we got out of the way was wet only at the edges exposed to water flow. If the material was firm we used it for stockpile and we were able to drive over it as we went out.

Q. Yes, it was piled up and used, but it was wet enough so that there was no foundation to build into until you got back the distances you gave me, twenty-five feet on either side?

A. No, I think perhaps you misunderstood there.

(Testimony of Wiley A. Clowers.)

Of course, all the reasons were not explained to me, but I later saw what was done, but those cuts were made and keyway cut down in them for core wall and gravel layer; then we in turn sloped down both those banks so that they in turn formed a part of the key or stiffened up part of the hole we first opened up.

Q. Yes, but you had to get back some distance from where the cut went through the bank in order to get a foundation to hook onto.

A. I suppose that was the purpose of cutting back. Anyway, we put the keyway in.

Q. Yes, and when you were removing that dirt, especially in the middle of the cut, it was wet, wasn't it?

A. Well, yes, it wasn't dry. However, we were able to drive over it all the time. [708]

Q. Well, you can drive over pretty wet ground with a cat, can't you?

A. Not if you stack it very deep.

Q. How wide was the bottom of that cut washed out when you got there, or do you know?

A. Pardon?

Q. How wide was the bottom of that cut washed out when you got there, or do you know?

A. I don't remember, sir.

Q. I think you said your brother worked the first shift anyhow, didn't you? A. Yes.

Q. And about how wide was it when you got there? What I mean by that is, what was the dis-

(Testimony of Wiley A. Clowers.)

tance across the bottom of the entire cut when you started putting your keyways down?

A. I believe sixty-five or seventy feet.

Q. At the bottom?

A. Yes, that is as my memory recalls it.

Q. And then you put keyways about sixty-five or seventy feet long on the bottom of the canal?

A. Yes, that is my estimate of it.

Q. And your distances, I suppose, on the top would be a little more than that, flare out on either end?

A. I don't think keyways are made that way.

Q. I am not talking about keyways. I am talking about the [709] hole in the wall.

A. Oh, yes, of course it was sloped down in both directions.

Q. Now, when you got this first break ready to lay your keyway, then, as I understand the operation, you dug as far into your keyway trench as you could with the Caterpillar and then someone else came along with a pick and shovel and finished up the job?

A. Yes.

Q. In the meantime you boys in the cats were getting the material ready and bringing it in and tamping it down and impacting with the operation of the machine?

A. No, we were at that time cleaning up the spoil pile in the adjacent area and consolidating the materials.

Q. But then when you finally got them consolidated you pushed them in?

A. Yes.

(Testimony of Wiley A. Clowers.)

Q. And then that operation continued there until you got the bank up about a distance of about four or five or six feet?

A. I worked intermittently, of course, on that bank construction. At the time that I left I would estimate that it was about four or perhaps four and a half feet high, the fill.

Q. When was it that you quit there?

A. I left there the morning of the second—of the day preceding the second break. I don't remember the exact time, but it seems to me just about noon I quit, perhaps just after [710] service time.

Q. That would be on noon of the day preceding the turning of the water in?

A. Well, of the second day, at least. I know I was called back about midnight.

Q. Of the second day? A. Yes.

Q. Now, how about this little cofferdam? Did you put that in? A. No, I did not.

Q. Let's see, there were two cats working there, and finally both cats got it built up to, say, about four and a half or five feet, or maybe six feet?

A. I couldn't say how far.

Q. All right; and were you driving your cat in from the north side? A. At what time, sir?

Q. Well, at any of the period? Which side were you working from?

A. Well, we were working, either one of us, from both sides, whichever the operation called for. We surfaced for awhile on the south side of the wasteway, and of course at that time we crossed

(Testimony of Wiley A. Clowers.)

the wasteway and went into the pen of the break.
(sic.)

Q. Now, on this key wall that you put in the bottom of the canal, that is, as I understand it, a trench three or four feet deep and filled with selected material. Now, was there [711] any effort made to carry up a similar key wall with selected material as you filled the canal on up, or did you just throw in the material at hand?

A. Well, the entire patch that we constructed was of the same material.

Q. Was that key wall that you put in the bottom of the canal extended or keyed into the respective banks on either side? A. Yes, it was.

Q. Okeh. Now, when the dam went out the second time you operated your cat in very much the same way you did the first time?

A. You mean in its repair?

Q. Yes, in its repair. A. Yes, in general.

Q. And did you cut back from the point of the second break, did you cut back then to the new bank you built the first time?

A. I don't believe I understand what you mean.

Q. Well, this second break went out at some eight or ten feet beyond the point that you had built the new embankment to.

A. Yes, it went out north of the——

Q. Yes, some ten or twelve feet.

Mr. Hess: Well, now, we object to his assuming some ten or twelve feet. Mr. Gallagher is testifying, not the witness.

(Testimony of Wiley A. Clowers.)

The Court: Go ahead. Objection overruled. [712]

Q. (By P. J. Gallagher): If I am wrong about the distance, you correct me on that. How far from the new fill was the break?

A. Well, the only point that I remember is that the water as it ran out washed away until it was washing on the base of our new patch. However, it seemed to fail to affect it, because it was solid and unblemished afterward.

Q. This dirt immediately north of the new fill was part of the second break?

A. Yes, it washed clean of all the water. However, the break happened just a little bit north yet of there.

Q. Oh, I presume it washed down the side.

A. Yes, somewhat as it did the first time.

Q. And when you got into that second break to bulldoze that out did you find a lot of soft material in there?

A. You mean in the fill we constructed?

Q. Well, I presume you trimmed that down the way you did the first break? A. Somewhat.

Q. And when you did that did you find some soft material in there?

A. No. We found, of course, the same wetness that we had put in there.

Q. But it wasn't soft.

A. No. Neither was the first 'dozing soft. We had about all [713] we could do with our cats to cut it out.

(Testimony of Wiley A. Clowers.)

Q. Where was the new material? High up on the bank?

A. The soft material was up on the bank.

Q. Could you determine where it came from, what location in the ditch bank it came from?

A. Oh, yes. We could see the dragline working, of course. It was coming, seemingly, from inside—at least the inside portion of the lower bank on the north side of the break, and from down underneath the surface of the bottom of the ditch some distance—I would say the bottom of the shovel was going down six feet or so from the base, bottom of the ditch. To say just exactly what point in there the wet material was coming from—well, I could only see it as it was dug out, but it seemed to be rather deep.

Q. Now, you spoke about a time when your attention was called to this vortex in the second break and the water gushing out on the downstream side. How far from the base or the toe of the canal bank was that water coming out?

A. That, of course, would be an estimate, because I was pretty excited at the time, but I would say between forty and sixty feet, in that vicinity. I wouldn't want to try to come closer than that.

Q. I didn't make the point clear. We will say this was the outside of the bank and you were looking off down here and the water was coming out somewheres here (illustrating), was [714] it half-way or three-quarters of the way down the bank?

A. No, nearly all the way down the bank. The

(Testimony of Wiley A. Clowers.)

particular bank at that point was steep to natural ground and just carried on, except at two or three times in carrying down the original bank there was some slough material that had come across it and it was in that slough material.

Q. And was it coming out above the surface of the ground where it hit the Shaw field there?

A. Well, just at the surface.

Q. Just at the surface? A. Yes.

Q. And, of course, that was quite a stream that came out of there?

A. Well, it seemed to me to be quite a stream at the time, yes.

Mr. P. J. Gallagher: I think that is all, Mr. Clowers.

Redirect Examination

By Mr. Hess:

Q. How far was this second cut or washout from down below—that is, the main portion of the washout, from below the upper point of your base or toe of the first patch that you had made for the first break?

A. I don't believe I got you clearly there, sir.

Mr. Hess: Will you read that, please? [715]

The Court: Read it.

(Pending question read.)

Q. (By Mr. Hess): That is, where you first saw it come through?

A. Well, you, of course, know or realize, I hope,

(Testimony of Wiley A. Clowers.)

that the immediate point of the break was not the point after the—was not the center of the washout after the water had run out the hole, and we could only estimate where that was exactly for the reason that all the water that was in the canal ran out through that hole after the break, cutting it back, of course, up to the upstream side——

Q. And then you would have to fill in?

A. That is right, and I would still have to estimate that distance forty to sixty feet.

A. In other words, the top of the bank fell down in and the water rushed down in there, is that it?

A. Yes, including the north wing or upper part of our wedge-shaped patch. The north end of it fell in and washed down with the break and the erosion that followed.

Mr. Hess: That is all.

Mr. P. J. Gallagher: That is all.

(Witness excused.)

The Court: Court is in recess.

(Short recess.)

Mr. Veeder: Call Otto S. Pettet. [716]

OTTO S. PETTET

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

A. Otto S. Pettet.

The Clerk: How do you spell your last name?

(Testimony of Otto S. Pettet.)

A. (Spelling): P-e-t-t-e-t.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Veeder:

Q. Where is your home, Mr. Pettet?

A. My home is about half a mile west of the head of the Malheur Siphon.

Q. How old are you, Mr. Pettet?

A. I am forty-nine.

Q. What is your position?

A. I am a ditch rider.

Q. By whom are you employed?

A. By the Owyhee Irrigation District.

Q. Would you describe your duties as a ditch rider?

A. Well, my duties is to deliver water to individual farmers and——

Q. Could you state from where you deliver water to individual farmers?

A. Well, I ride from 38.9 on the main canal to 33.1. [717]

Q. That is the North Canal?

A. That is right. And then I take in some of the 38.9 ditch down about a quarter below .07.

Q. How long have you been employed as a ditch rider?

A. I have been—this is the twentieth year.

Q. How long have you been riding the segment of the ditch to which you have just referred?

A. I believe nine years.

(Testimony of Otto S. Pettet.)

Q. Would you proceed and tell the remainder of the duties which you have as a ditch rider?

A. Well, I deliver the water and put it out to the farmers according to their acreage and according to their requests up to the capacity of the ditch.

Q. And how do you do that?

A. Well, I turn the water down these laterals out of the main ditch and then divide it according to acreage.

Q. Do you have any other responsibilities as a ditch rider?

A. Well, I maintain ditches, help clean them, keep the weeds out and all of the obstructions out of the ditch, and keep the gates and weirs free, and then, of course, I keep the account of the water for the season for each water user.

Q. What activities do you perform for the security of the North Canal?

A. Well, I patrol the North Canal and watch for any leaks or breaks in the ditch. [718]

Q. What are your instructions with respect to seep area that you observe?

A. Anything that doesn't look sound or anything that looks like it might be dangerous I am supposed to report to the office.

Q. Are you acquainted with the seep on the Hust place? A. Yes, sir.

Q. What activity do you perform with regard to it?

A. I watch that seep, just to see if it gets

(Testimony of Otto S. Pettet.)

stronger and just to see if it develops anything more than it ordinarily carries.

Q. Do you perform any other functions in which you contact the farmers in that area?

A. Well, I take their crop reports in the fall of the year, and that is about all so far as——

Q. You are well acquainted with the farmers in the area?

A. Quite well, yes, sir, I am.

Q. Are you acquainted with the break that occurred in the North Canal on July 14, 1946?

A. Yes, sir.

Q. Did you patrol the segment of the canal the day of the break? A. I did.

Q. What did you observe in the segment of the canal which breached?

A. I didn't see a thing there that was unusual at all.

Q. Would you describe the canal at that point?

A. Well, it comes around the bend there, up south of there, and kind of straightens out. It looked to me or ordinarily would be a fairly safe place in a ditch.

Q. At what time did you patrol there——

A. I patrolled there, I would say, about 8:45, and came back over it about 9:15, I would say.

Q. You passed over the segment which broke on two occasions? A. That is right.

Q. Are you acquainted with the Ben Shaw property? A. Yes, sir.

Q. Would you describe the land on the Ben Shaw

(Testimony of Otto S. Pettet.)

place immediately below the break prior to the time of the break?

A. Well, that piece of land was in red clover at that time. It is a very short little point in there. I wouldn't—it runs down, I would say, maybe four hundred feet that he irrigated, into a draw in his field.

Q. There was a crop on the land?

A. That is right.

Q. Are you acquainted with Ben Shaw?

A. Very well.

Q. Were you ever advised of any seep in that field? A. No, I was not.

Q. No notice whatever of any seep?

A. No, sir.

Mr. P. J. Gallagher: This is leading and suggestive, your [720] Honor.

Q. (By Mr. Veeder): When were you notified of the break in the canal?

A. I was notified about noon; I would say about 12:30.

Q. What did you do then?

A. I immediately got in my car and drove up to the break.

Mr. Veeder: No further questions.

Cross-Examination

By Mr. P. J. Gallagher:

Q. Mr. Pettet, you say you checked the seep that comes up on the Hust place?

A. I check it occasionally.

(Testimony of Otto S. Pettet.)

Q. How long has that seep been running there?

A. Well, I am not sure, but I remember that has been running there for three or four years.

Q. Has it increased in volume?

A. I don't believe it has.

Q. And are you familiar with the seep that is just north of the north edge of the Shaw place, in that gulley?

A. Yes.

Q. How long has that seep been there?

A. Well, I have known of it three or four years anyway.

Q. In riding the ditch, as you call it, you drive a car along the roadway on top of the ditch?

A. That is right. [721]

Q. Did you occasionally get down and look at the discharge in the draw above, on the north side of the Shaw place?

A. I occasionally do.

Q. Did you do it on that occasion?

A. I didn't that day.

Q. And do you keep a check on that to see if that is increasing or not?

A. No.

Q. That water, in your opinion, comes from the ditch, some place in the ditch?

A. Well, yes.

Q. And how much would you estimate that flows in miner's inches?

A. It is rather hard to tell. It seems like it comes into that draw in kind of a fan shape.

Q. It comes in from a kind of a spread-out area?

A. That is right.

Q. And then gathers in the draw and runs down the draw?

A. Yes.

(Testimony of Otto S. Pettet.)

Q. Have you gone down the draw, so you can estimate the amount of discharge?

A. No, I haven't.

Q. And you never did walk up across the Ben Shaw place? A. No, I haven't.

Q. And such examination as you have made of the Ben Shaw [722] place is what you looked and were able to see without coming down the ditch bank? A. That is right.

Q. Did you know about Shaw's efforts to cut his hay crop there in 1945? A. No, I didn't.

Q. You didn't know anything about that. Did you know anything about George or Phil Matherly trying to plow in there and getting his equipment and stuff out? A. No, I didn't.

Q. You don't know of anything that would indicate to you that the Shaw place was wet?

A. No, I don't.

Q. And you never, as you said before, got down and walked across it? A. No, I didn't.

Q. Now, when you got out there, you were notified, you say, about 12:30 Sunday, on the day the ditch broke? A. That is right.

Q. And you drove up as fast as you could, I presume? A. That is right.

Q. How far did you have to drive, Mr. Pettet?

A. How far?

Q. Yes.

A. Well, that is—let's see—well, about three miles, I [723] would say.

Q. How were you notified? By telephone?

(Testimony of Otto S. Pettet.)

A. No; George Hust drove to my place and told me.

Q. George was perhaps one of the first fellows to see the break?

A. Well, I kind of think he was one of them, yes.

Q. Then, without further delay, you and George went up there?

A. No; George left and I went up alone.

Q. How much water did you see discharging from the ditch at that time?

Mr. Veeder: I object as the witness not qualified.

Mr. P. J. Gallagher: Well, just generally.

The Court: If he knows, he can tell. If he doesn't know he can say he doesn't know.

A. Well, I don't know.

Q. (By Mr. P. J. Gallagher): What part of the ditch bank was the water coming out of? Halfway down?

A. I don't know as I understand that, now.

Q. Well, the water was coming out of the lower side of the bank? A. That is right.

Q. When you got there? A. That is right.

Q. And how far up the bank was the water coming out, from the toe?

A. Well, that is kind of hard to say. I just couldn't say. [724]

Q. Well, would you say it would be a third of the way up, or halfway up, the bank?

A. Well, it wouldn't be over a third, I would think.

(Testimony of Otto S. Pettet.)

Q. You think it would be about a third of the way up?

A. Well, that would be a fair guess.

Q. And who were the first people that came there?

A. Well, the first people, I think, were Mr. Spofford and Mr. Bolitho.

Q. And then they got to work and you got to work?

A. Well, I did the only thing I could do. I was on the other side of the break from them, and it was kind of noisy, and I just couldn't do anything.

Q. They were on the north side and you were on the south side? A. Yes.

Q. And what did you do? Did you stay there all afternoon?

A. I stayed there a short time.

Q. And then you went on back home?

A. That is right.

Q. Had the ditch fallen in at the time you were there? A. Oh, yes.

Mr. P. J. Gallagher: I think that is all.

Redirect Examination

By Mr. Veeder:

Q. Did you ride the ditch every day as part of your duties? A. That is right. [725]

Mr. Veeder: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Veeder: Call Mr. Senger. [726]

HENRY L. SENGER

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Will you state your name, please.

A. Henry L. Senger, S-e-n-g-e-r.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Veeder:

Q. Where do you reside, Mr. Senger?

A. Boise, Idaho.

Q. How old are you? A. Seventy.

Q. What is your occupation?

A. Civil Engineer.

Q. Would you give a statement of your general education and background?

Mr. P. J. Gallagher: Oh, we will admit his qualifications, to shorten it up.

Mr. Veeder: We would like to have him give them.

The Court: Go ahead, generally.

A. I graduated with the degree of Bachelor of Science from the University of Nebraska in February of 1903, and worked for an organization in Chicago called the Barlow Company for nine years on hydroelectric construction and railroad shopwork, and finally, in the summer of 1908, came to Homestead, Oregon, [727] where they were going to build a hydroelectric plant on the Snake River at a point called the Oxbow in Snake River. I stayed on that

(Testimony of Henry L. Senger.)

work for four years, until the work was abandoned unfinished, and came to Boise and worked for the interurban railroad, which was then under construction, between Napa and Caldwell and Boise, part of the loop system.

In the fall of 1912 I was transferred to Swan Falls on the Snake River and reconstructed a portion of the power plant at that time, and since that time I have been engaged in building power plants and maintenance of power plants and canals and ditches, and things that appertain to the production of power, since my return on the first of this year.

Q. Have you constructed earthen canals through areas somewhat similar to this?

A. I constructed one major canal that had a capacity of 6500 second-feet. It had earth embankments, but the bottom was made of a sort of a rock formation which probably was harder than soil.

Q. For whom did you perform those services?

A. Idaho Power Company.

Q. Did you ever work generally in earth fill, perform earth-fill work, in construction?

A. In the nature of abutments to hydroelectric constructions, and things of that nature.

Q. Were you present in the court room at the time that Mr. Boden [728] testified with respect to the construction of the canal? A. I was.

Q. And, in your opinion, were the methods which he followed and the means which he used in the construction of this canal reasonable engineering precautions? A. I would think so, yes.

(Testimony of Henry L. Senger.)

Q. Have you investigated this segment of the canal where the breach occurred?

A. Yes, on April 21st, and continuing through four additional days.

Q. Did you observe the type of construction throughout this area? A. Yes, sir.

Q. In construction of this character is it customary to construct a core bank in the bank of the canal?

A. Core bank in the bank of the canal?

Q. Of the lower bank?

A. As distinguished from a core—you are talking about the embankment?

Q. The core trench is what I meant.

A. The core trench as distinguished from the core in the embankment?

Q. Yes, that is what I meant.

A. No, I would say it is not usual to build a core trench.

Q. Do you know of any instances in which that has been done? [729]

A. No, I have never done that myself.

Q. In the construction of a canal of this character what are the methods that are used, precautionary methods which are used, in engineering to determine and ascertain the security of the canal? What kind of investigation do you make with the dirt removed?

A. Judged from my experience, when the ground is opened up the engineer can see the character, the kind of ground it is, and, judging from what he sees and his experience, why, he makes determinations

(Testimony of Henry L. Senger.)

of whether there is anything further to do, and from my observations that I have seen over there in this compacted sandstone I would say that there would be no necessity for any additional work.

Q. Did you hear Mr. Gordon testify with respect to the stratum of material beneath the bottom of the canal some four feet? A. Yes.

Q. Would it have been a reasonable precaution to drill down into that area to ascertain the existence of that stratum at the time the constructon was made?

A. Well, I would say this, that it was something hidden, he didn't know it was there, and there would be no necessity to drill for it, because even then you may not have found it. As I got the testimony, it wasn't found in the first wash and drilling there would have shown nothing. Of course, there are occasions in my experience where I have found where water issues, [730] probably, out of a hole, you might drill a foot or two from it and miss it entirely.

Q. Have you had any experience with respect to seeping canals or other structures?

A. Yes, sir.

Q. Will you state to the Court what is indicated by the seepage of the character that you encountered?

A. Well, on the Horseshoe Bend Canal, which is a power canal—of course, it serves a useful purpose of transmitting water for power rather than for irrigation, but the hydraulics are all the same—it

(Testimony of Henry L. Senger.)

has an earth embankment and water seeps through this earth slowly and comes out as clear water at the base, and, just as testimony has shown here, when you release the water out of the ground and it comes out clear and there is no change in the volume we do not consider it dangerous. As a matter of fact, that is the natural condition. Whenever there is danger to an earthen embankment it is because it doesn't bleed out, the water is contained in it.

Q. In your investigation did you observe the seepage on the Hust place south of where the breaks occurred?

A. At a point there was what appeared to be a small spring on the Hust place, so-called, which was, I think, south of the break.

Q. In your opinion, is that a dangerous condition?
A. Not in my opinion. [731]

Q. In your investigation did you go over the property situated as appearing on Plaintiffs' Exhibit 82, that 4.3 acres there?

A. The Shaw place?

Q. That is correct. A. Yes, sir.

Q. What type of investigation did you make?

A. When I first came on the ground on the 21st of April and the four subsequent days I went over, very carefully over, the ground looking for some source of seepage or wetness, or something of that kind, on this ground. At that time the clover and the alfalfa shoots and the small leaves were just appearing, we couldn't see anything then, of course,

(Testimony of Henry L. Senger.)

excepting that greenness appearing at that time, but the ground was absolutely dry. There was a small farmer's ditch at the toe of the low embankment, that is, the outer embankment, before the repair was made, and along that small farmer's ditch there were a few scattering cottonwoods growing, I think there were two or three sprigs of willows at one place. And since the break had been made, apparently, they re-routed this small farmer's ditch to a point maybe eight or ten feet below where the break occurred. And then I discovered the drain tile which apparently had been put in during construction to bleed out water should there have been any in the embankment, but all these ditches and the drain tile were absolutely dry when I was there.

Q. Have you investigated that area recently?

A. I was over there Monday evening.

Q. Would you state the condition of it at this time?

A. Just as I found it at that time, and in addition to that I dug rather vigorously, put a hole maybe four hundred feet below on the south side of the break, out in the field, and we dug down and measured eighteen inches and it was hard and dry all the way down.

Q. In your investigation did you ascertain the depth of the topsoil in that area?

A. Oh, it varies. The underlying layer of hardpan beneath the topsoil is of an undulating and irregular nature, and the depth of the topsoil is possibly from a foot to eighteen inches and possibly

(Testimony of Henry L. Senger.)

in places maybe two feet, possibly, depending on the shape of the underlying hardpan.

Q. What is the effect of that hardpan underneath the topsoil in an area that is irrigated?

A. That was hard soil before the breaks occurred and is continuing across these two washes of the first and second so-called breaks, is a continuous layer, it is now continuous across one of the breaks, unbroken even after all the water went over it; so if we could visualize a hardpan beneath the soil with a ruffled surface which would make basins of various sizes that would contain water, then the water from the farmer's ditch would flow down on this sort of a roof and hardpan and [733] fill these basins of various sizes and hold water; then a farmer has the—I am not a farmer, but I have seen them do it, when they went to take off a crop of hay, for instance, they shut down the ditch to dry the field so they can drive over it. This water, then, it is still in these cups or basins of various sizes in this hardpan, it can't drain out, so it keeps that still moist until it can evaporate through the surface.

Q. Would that have explained the situation that the plaintiffs' witnesses have described in the field as showing the seep—that which is supposed to be the seep area in there?

A. In my opinion, yes.

Q. Could that have come from the farmer's ditch?

A. I think that is where it did come from.

(Testimony of Henry L. Senger.)

Mr. Veeder: That is all.

Cross-Examination

By Mr. P. J. Gallagher:

Q. Was there water in the ditch when you went out there, Mr. Senger?

A. In the main canal?

Q. Yes. A. Yes.

Q. You had no opportunity to observe the mountainside side of the canal, did you? [734]

A. You mean the hillside?

Q. The hillside, yes.

A. Oh, yes, I was all up and down the ditch.

Q. Pardon?

A. I was all up along the ditch. I could observe the part above the water.

Q. Above the water? A. Yes.

Q. You were not able to observe the structure of the ditch below the water line?

A. No, I couldn't see under the water.

Q. Now, in your work I presume you have endeavored to construct your canals for the purpose of conserving water as well as transporting it?

A. Well, yes, that is true, and in a hydroelectric canal we intend to conserve the head of water and get all the water we can. Conserving the head is more important than in an irrigation canal.

Q. Assuming that in the construction of a ditch you run into a bed of ground that contained gravel and loose, pervious structure for a distance of five

(Testimony of Henry L. Senger.)

or six hundred feet in spots and for a depth averaging from a foot and a half to three or four feet, the ditch just cross sectioning that gravelly structure that was up on a hillside, would you think good engineering would require you to take some precaution against [735] that leaking?

A. I wouldn't say that I would agree with that in this case, but, assuming that it is a hypothetical question, I would answer in the affirmative.

Q. Assuming it is a hypothetical question?

A. Assuming it is a hypothetical question, I would answer in the affirmative.

Q. You would do something toward finding that?

A. I think I would do some protection, yes, if that was the case.

Q. I don't ask you to agree about the facts.

A. No, I haven't.

Q. You are appearing for the other side.

A. Yes.

Q. And if you watch that ditch over a period of two or three years and you discover that immediately underneath, in the area underneath, the land is being soaked to the point that the man couldn't farm, would that cause you to look for a source of water that might be seeping through the bank of the canal?

A. Yes, and, as I have said, the source of water was the farmer's ditch.

Q. You are assuming that any water that came on the place came out of the farmer's ditch?

A. Yes. [736]

(Testimony of Henry L. Senger.)

Q. Did you hear the testimony of the witness Matherly, who tried to plow before the irrigation season started and got his tractor bogged down?

A. Yes, sir.

Q. Do you think that water remained in the Shaw land all winter long to the extent that his tractor bogged down in the spring?

A. Yes, through snow and rain in the winter.

Q. How long have you lived in this community?
A long time, haven't you?

A. At Boise?

Q. Well, in the Snake River Valley?

A. Since 1914 in Boise. I came to Boise in 1912.

Q. And you think there might have been enough rainfall on the Shaw place to bog a tractor down?

A. No; I said that the water that did fall was contained in these small basins on account of this impervious stratum.

Q. Do you think that the seepage that you saw coming out on the Hust place is perfectly safe, nothing to worry about, so far as the safety of that structure is concerned?

A. We had similar things on the Idaho Power Company system that we didn't worry about at all.

Q. Well, that isn't the question.

A. Well, that is based on my experience. I would say no.

Q. You realize, don't you, that this canal did go out? [737]

A. Yes, from a hidden cause.

Q. And where was the water coming from, in

(Testimony of Henry L. Senger.)

your opinion, to supply that hidden defect that resulted in the ditch going out?

A. Well, my judgment of the stratification over there, why, it could come from 'most any place, because the stratifications aren't continuous, they are made up of interlaced little flows, and they might go down or sideways or 'most any direction. You never can tell the source of water by looking at the top.

Q. But the water has to come from some place to liquefy that stratification.

A. Yes, that is true. We have some cases on the Idaho Power Company that comes a quarter of a mile, but I don't know where it comes from.

Q. In a broken stratum?

A. Well, I don't know.

Q. Now, if you were operating that ditch, with the responsibility of keeping it in operation for the supply of water for irrigation of all of these lands, and you found it seeping through the side of the ditch to the extent that I have just remarked to you, would you have tried to seal the ditch or seal its sides in an attempt, at least, to stop that?

A. Well, as I get the testimony, that isn't the case, it didn't seep out. I didn't see any evidence.

Q. No, I am asking you to assume that for the purpose of the question. [738]

A. If this is a hypothetical question——

Q. Now, take my assumption on that as I give it to you, then answer the question.

A. If you would repeat the question, please.

(Testimony of Henry L. Senger.)

Q. Assuming that you were operating this ditch and you were the superintendent or an owner of it, with the responsibility of getting the water down to these farmers, and at this particular spot you knew the water was coming out of the ground at the toe of the canal over an extended area, and you knew the ditch was not lined inside, you knew it was cut through a gravelly, porous stratum, would you then have taken some steps to have sealed that canal on the inside of the canal in an attempt to stop the water?

Mr. Hess: Just a minute——

A. I would, yes.

Mr. P. J. Gallagher: He has answered.

Mr. Hess: I want to put an objection in there as assuming a state of facts not based on the facts of the case.

The Court: Oh, I think he can answer.

Q. (By Mr. P. J. Gallagher): Now may we get your answer? A. I said yes.

Mr. P. J. Gallagher: That is all.

Redirect Examination

By Mr Veeder:

Q. What would be the effect on the North Canal of continuous [739] operation for a period of eleven years, that is, running the water through the North Canal for a period of eleven years?

A. Why, it should improve the condition.

Q. It should what?

(Testimony of Henry L. Senger.)

A. It would improve the condition.

Q. What would it do with respect to sealing the canal?

A. It would continue to seal it tighter each year.

Mr. Veeder: That is all.

Recross-Examination

By Mr. P. J. Gallagher:

Q. You mean in the manner in which the experience up there shows?

A. I mean that an earth embankment that is subjected to water for a long time improves in condition each year and gets tighter.

Q. To the point where it blows out?

A. Well, this is a hidden thing. I am talking about the earth embankment. I don't know anything about what was underneath it.

Mr. P. J. Gallagher: That is all.

Mr. Veeder: That is all, Mr. Senger.

The Court: Now, as I understand you, at the present time this Shaw place is absolutely dry?

A. That is right.

The Court: That is a highly dangerous condition, isn't [740] it, according to your testimony?

A. If they turn water into—no, I don't think so.

The Court: No? I thought that was what you said, that if it was not seeping through there that that indicated a very highly dangerous condition, that the bank was not letting water through and it was banking up behind there.

(Testimony of Henry L. Senger.)

A. Well, if there is any seepage it is going down underneath to some location that is not visible.

The Court: Well, as I understand your testimony, whether the bank is dry or whether it is full of seeps, it does not in either case indicate a dangerous condition?

A. No, if there is seepage and if it is relieved, then I don't think it indicates a dangerous condition, but if there is a seepage and it is contained underneath it builds up a pressure.

The Court: The only time it is dangerous is when you can't tell anything about it?

A. Well, that is about it—if it is hidden it is pretty hard to tell anything about it.

The Court: Well, you assume it is hidden, but you say that in any other condition if that hillside is dry down below then that does not represent a dangerous condition?

A. Well, if the hillside is——

The Court: Answer my question. I say that you have said here, and this is your testimony, that if that hillside is dry that does not represent a dangerous condition; is that correct? [741]

A. That is right.

The Court: And likewise if there was a lot of water seeping down there, why, that shows that the bank is bleeding and therefore in good condition?

A. Well, if it bleeds out, yes, I don't think it is a dangerous condition.

The Court: In other words, either way is no sign of danger?

(Testimony of Henry L. Senger.)

A. Well, if it is hidden in there.

The Court: Well, I don't care anything about "hidden." I say you think if that bank is dead dry that that is not dangerous? A. Yes.

The Court: You likewise say that if it is seeping and bleeding down there that is not dangerous?

A. Yes.

The Court: What is dangerous?

A. An indication is usually nothing that you can see. In other words, if I might illustrate——

The Court: Well, you can see a seep.

A. Yes.

The Court: And you can also see it dry?

A. Yes. I didn't observe any seep there, so I have to say it was dry.

The Court: So that is what I am asking you—what would be an indication of danger to your mind? [742]

A. Well, I would say an excessive seep that may have water to an extent that the water becomes roily and contains particles of sand.

The Court: Oh, yes, about the time the canal went dry that would be dangerous?

A. Oh, no, you can see that a long time before there is danger. That is a matter of inspection, and we have operators go over these canals to see if there is any change in the amount of water that might come clearly out of these seep holes.

The Court: And I take it, also, that you mean that if you constructed a canal and you didn't hap-

(Testimony of Henry L. Senger.)

pen to see the particular stratum you had no responsibility for it?

A. Well, if there is no indication there is no reason to try and expose something that you don't know exists.

The Court: Well, there is some indication that there might be a different type of stratum there, isn't there?

A. Well, I spent three days digging in it and I would say it was a rather hard sandstone and I wouldn't expect that there would be any danger in that if the canal was dug entirely inside of this formation.

The Court: Well, you know it did go out.

A. Yes. If I might digress, we had a failure in a canal on the Idaho Power Company system, where the thing was operating twenty years. Now, we don't know what caused it, I don't know where the water came from. And if the Bonneville Dam goes [743] out after twenty years the engineers who built it don't have any responsibility for that. I don't know anything about the Bonneville Dam.

The Court: I am asking you. In other words, if you built it and it stays that is good engineering, and if it goes out that is still good engineering?

A. Well, I don't know about that.

The Court: Well, that is what you are saying.

A. Well, you take an element of risk in whatever you are doing, a calculated risk, and a matter of economy.

The Court: Well, I don't think I will examine

(Testimony of Henry L. Senger.)

you on the economy. That is all. Would you like to ask him some more questions?

Mr. Hess: Just a minute, your Honor.

Mr. Veeder: We have no further questions, your Honor.

Mr. P. J. Gallagher: Could I ask him one question, your Honor?

The Court: No, you have already covered it. I think we will let it go at that.

Mr. P. J. Gallagher: That is all.

The Court: That is all.

(Witness excused.)

Mr. Hess: Would your Honor give us about a ten-minute recess?

The Court: Yes. [744]

(Short recess.)

Mr. Hess: If your Honor please, the defendant rests.

Mr. Lytle: If your Honor please, the plaintiffs in 3871 rest.

Mr. P. J. Gallagher: And the same in 3669 and these other cases.

Mr. Hess: And I presume that applies to all the cases under consolidation?

Mr. Lytle: Yes.

Mr. Hess: As to the failure-to-deliver-water cases.

The Court: All right. Then, according to what was said at adjournment, I will now adjourn court until tomorrow morning at 9:00 o'clock.

(Whereupon, at 4:40 o'clock p.m., Wednesday, June 16, 1948, the trial of the above-entitled cause was suspended, the Court adjourning to 9:00 o'clock a.m., Thursday, June 17, 1948.) [745]

Thursday, June 17, 1948, at the hour of 9:00 o'clock a.m., at Vale, Oregon, the trial of the above-entitled cause was resumed and continued as follows:

Mr. Hess: If your Honor please, it appears that in closing our case yesterday we overlooked the offering of certain exhibits in the record and a few other matters that will take a very short time. We would like to open up the case. Let's see, what are the numbers of the two cases we are on?

Mr. P. J. Gallagher: 3669 and 3871.

Mr. Hess: 3669 and 3871, and the cases consolidated with those cases—we would like to open up the cases and offer some more proof, your Honor.

The Court: Yes.

Mr. Hess: If your Honor please, at this time we offer in evidence Defendant's Exhibit marked for identification No. 34, being the Finding of Feasibility of the Project.

Mr. P. J. Gallagher: There is no objection to that, your Honor.

The Court: Admitted.

Mr. Lytle: One moment, Mr. Hess, while you are on that subject. The pre-trial order, through error, shows 34 as plaintiffs' exhibit.

Mr. Hess: Yes; that is a defendant's exhibit, and may the pre-trial order be corrected in that

respect to show that that is Defendant's Exhibit No. 34 and not plaintiffs' exhibit?

The Court: Yes, the pre-trial order should be amended.

Mr. Lytle: I think, Mr. Hess, that series of exhibits in the Sheff White case are noted as your exhibits, but in 3871 they are noted as plaintiffs' exhibits.

Mr. Hess: Yes, on one page they are.

(Photostatic copy of Finding of Feasibility of Secretary of the Interior, approved October 12, 1926, so offered and received, having previously been marked for identification on pre-trial conference, was thereupon marked received as Defendant's Exhibit 34.)

Mr. Hess: Now, if your Honor please, may the pre-trial order be amended in case No. 3871 to show that the identified exhibits 36, 37 and 38 are shown to be defendant's proposed exhibits rather than plaintiffs'?

Mr. Lytle: That includes 39, 40 and 41.

Mr. Hess: Well, on the sheet that I have it shows as defendant's, the rest of them.

Mr. Lytle: Oh, yes, that does show that.

Mr. Hess: Thirty-six, 37 and 38 are shown as plaintiffs' exhibits, and they should be designated and shown as defendant's exhibits.

The Court: Yes.

Mr. Hess: May the record be changed, your Honor, amended, the pre-trial order? [747]

The Court: Yes.

Mr. Hess: Now, if your Honor please, we offer in evidence Defendant's proposed exhibits, marked for identification, Nos. 36, 37, 38, 39, 40 and 41 in each of the cases numbered 3669 and 3871 and each and all of the cases that have been consolidated in the trial of those cases.

The Court: They are admitted.

Mr. P. J. Gallagher: That——

The Court: Do you want to object?

Mr. P. J. Gallagher: No.

Mr. Lytle: Yes, your Honor, in the matter of 3871 and 3870, we renew our objection to Defendant's Exhibits for identification 36 to 41, inclusive, on the ground and for the reason that they do not tend to prove any issue in this cause between the parties as to those two cases.

The Court: Well, the objection is overruled and the Court will admit the exhibits. Of course, if they are not material to your case I will not consider them.

(The documents referred to, so offered and received, having previously been marked for identification on pre-trial conference, were thereupon marked as follows:

(Photostatic copy of contract between Gem Irrigation District and the United States of America, dated October 14, 1926, was marked received as [748] Defendant's Exhibit 36;

(Photostatic copy of contract between Payette-Oregon Slope Irrigation District and the United States of America, dated October 14,

1926, was marked received as Defendant's Exhibit 37;

(Photostatic copy of contract between Crystal Irrigation District and the United States of America, dated November 28, 1931, was marked received as Defendant's Exhibit 38;

(Photostatic copy of contract between Advancement Irrigation District and the United States of America, dated September 1, 1936, was marked received as Defendant's Exhibit 39;

(Photostatic copy of contract between Bench Irrigation District and the United States of America, dated October 5, 1931, was marked received as Defendant's Exhibit 40; and

(Photostatic copy of contract between Slide Irrigation District and the United States of America, dated October 14, 1926, was marked received as Defendant's Exhibit 41.)

Mr. Veeder: Your Honor, at the conclusion of the Plaintiffs' case the United States moved for a dismissal on the ground that the facts as proved have indicated, in our opinion, that they are discretionary in character and therefore exempt from the [749] provisions of the Act. I would at this time to object to your Honor's ruling on that and denial and have the record note an exception to it.

The Court: Yes.

Mr. Hess: Is there anything else?

Mr. P. J. Gallagher: I think not.

Mr. Lytle: I think not.

Mr. Hess: Your Honor, defendant rests in each of these cases 3871 and 3669 and all of the cases consolidated with them for the trial and on the question of liability.

Mr. Lytle: If your Honor please, I think that before we rest this stipulation that was discussed should be entered into in this case, for the simple reason that the last paragraph in the case is evidentiary and is an admission of the fact, but so far as the flooding cases are concerned, 3870, water from the breaks did inundate portions of the lands described in the pre-trial order.

Mr. Hess: As I view that, Mr. Lytle, we are making stipulations, which will be filed in each of the flooding cases, adopting this record, and these stipulations do not apply and are not a part of these cases here, but they are in the flooding cases; is that correct?

(A conversation between Mr. Hess and Mr. Lytle in an undertone here ensued.)

Mr. Hess: If your Honor please, we rest. [750]

Mr. P. J. Gallagher: Well, we rest too.

Mr. Hess: Now, if your Honor please, in Civil 3669 and in each of the cases consolidated with that case, the flooding case Civil 3870, and 3853, and Civil 3861 to 3865, all inclusive, we have a motion at this time that we desire to file on behalf of the United States for dismissal, and may the record show that a copy of this motion has been

served upon each of the plaintiffs' counsel in the case.

The Court: Well, the trouble is that the—oh, yes.

(A conference between counsel in an undertone here ensued.)

Mr. Lytle: Do you want to correct this copy also?

Mr. Hess: Yes, your Honor. We left one case out, if you notice, and we will have to write it in.

The Court: Well, this motion to dismiss is nothing except something to hold your record. I can treat it, anyway, because I am going to determine this case on the evidence, I will not make up my mind on questions of law, even though I may hold them invalid on the motion to dismiss. I have heard all the evidence and I will decide the case on its merits, that is what I am going to do, so it is immaterial, as far as I can see, as to whether I overrule this motion summarily or that I keep it under advisement. I have no feeling about it one way or the other, whatever you want done technically, because actually I am going to make up my mind on the matters in the light of the [751] testimony. The questions are posed by the pre-trial order, and those I expect to decide on the evidence.

Mr. Hess: As I understand, your Honor, the previous motion was filed, the motion for dismissal?

The Court: Yes.

Mr. Hess: And on this one does the same thing apply?

The Court: Well, all right, I will take it under advisement. It is just a question of technicality. I might just as well overrule it, because I am not going to consider it on this basis anyhow. I will consider it on the merits. Of course, if I find out after considering all the testimony that I do not have jurisdiction I am not going to decide the case on any other ground.

Mr. Hess: If your Honor please, on this question of liability we would like some time for further preparation of memoranda for the Court, and Mr. Veeder is very busily engaged and will be in some other heavy water litigation, and we would like to ask for sixty days for further briefs on the part of the Government on the question of liability.

The Court: Do you see any objection to that?

Mr. P. J. Gallagher: No.

Mr. Lytle: We have no objection, but just one inquiry, and that is with respect to the transcript of the record, and that would be as to whether or not the Court will await a transcript of the record before determination? If so, we would like the transcript of that record before we brief on the facts, as well as the law.

Mr. Hess: I think that would be advisable from both standpoints. I just wonder if we can't get an intimation about when we would have the record, because we would like to have at least thirty days after we see a copy of the record. I think that suggestion is very well taken.

The Court: How about that, Mr. Reporter?

(Short discussion off the record.)

The Court: I will tell you, if you have ordered the transcript——

Mr. Hess: We have ordered it.

Mr. Lytle: We have ordered it.

The Court: ——I will say that I will extend you thirty days after you receive the transcript for the first brief. And how long would you like to have after that?

Mr. P. J. Gallagher: About the same.

Mr. Lytle: We would like to have about the same time.

The Court: Then thirty days after the service of the Government's brief.

Mr. Lytle: Yes, your Honor.

The Court: If the Government then wishes to file any memorandum I will give them five days after your brief is in, strictly applied.

Mr. Hess: Strictly applied. [753]

The Court: And thereupon I will take the matter under consideration, and if at that time I should feel that I should have oral argument I will set it, but I won't set it for oral argument until all briefs are filed.

Now you may proceed to the other cases.

(Thereupon the Court proceeded to the transaction of other business, and thereafter proceedings herein were had as follows:)

Mr. Hess: If your Honor please, we had some

field notes marked here as one of our exhibits that the witness testified from and refreshed his recollection from. If the Court desires to have that for any purpose we haven't any objection, but in the end the Bureau will desire that back, and we just wondered if there is any objection now to it going back to the Bureau or if the Court would prefer to have it. It is not introduced in evidence. And also, relative to the model, No. 53, on account of the heft and bulk of that exhibit we have stipulated between ourselves, if satisfactory with the Court, that that exhibit need not be taken to Portland and kept in the records of the Court, but that it can be kept at the Bureau of Reclamation at Boise, subject to the call of the Court if the Court so desires.

The Court: That is stipulated?

Mr. P. J. Gallagher: That is agreed.

Mr. Lytle: Yes, your Honor. [754]

The Court: Now, then, how about this other? You will have to enter into a stipulation on this. I won't do anything about it unless counsel agree, that is.

Mr. P. J. Gallagher: Oh, it is perfectly all right with us for the Bureau to retain that.

The Court: What is that number?

The Clerk: 65-A.

The Court: The Bureau's Pre-trial Exhibit No. 65-A is released to the United States.

Further matters?

Mr. P. J. Gallagher: No, your Honor.

The Court: At this time the Court adjourns the special term at Vale sine die.

(Whereupon testimony and proceedings in the above-entitled cause at Vale, Oregon, were concluded, and at the hour of 11:00 o'clock a.m., Thursday, June 17, 1948, the special term at Vale, Oregon, was adjourned sine die.)

Certificate

I, Cloyd D. Rauch, hereby certify that I am a Court Reporter of the above-entitled Court, duly appointed, qualified, and acting; that I reported in shorthand testimony and proceedings at the trial of the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages 1 to 755, both inclusive, contained in volumes numbered I and II, constitutes a full, true and accurate transcript of said testimony and proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated this 26th day of July, A.D. 1948.

/s/ CLOYD D. RAUCH,
Court Reporter.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of

complaint, motion to dismiss, motion for more definite statement, answer, motion to bring in third-party defendant, motion to dismiss, pre-trial order, motion for dismissal, order consolidating cases for trial, opinion of Judge Fee, findings of fact and conclusions of law, final judgment, notice of appeal, motion for order for time to file bonds, stipulation, order allowing time to file bonds, designation of record on appeal, and transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 3669, in which Sheff White, Orland White and Joe M. White are plaintiffs and appellants, and the United States of America is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court on Portland, in said District, this September 7th, 1950.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12689. United States Court of Appeals for the Ninth Circuit. Sheff White, Orland White and Joe M. White, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed September 12, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

In the matter of the appeal of the following named
Plaintiffs and Appellants against the United
States of America, Defendant and Respondent.

STIPULATION

SHEFF WHITE, CASE NO. 3669; PETE AND
EUGENE BICART, NO. 3674; J. F. WAL-
LACE, NO. 3675; LOIE BELISLE, NO. 3677;
HARRY G. FRASIER, NO. 3681; CLIF-
FORD PUTNAM, NO. 3683; LEO MONCE,
ET AL., NO. 3684; MARTIN J. RICH, NO.
3686; FRANK BALBOA, NO. 3687; GROVER
C. FINDLEY, NO. 3689; BASIL TRUE-
BLOOD, NO. 3693; JONESIE DELEON
SCOTT, NO. 3716, HOWARD AND B. G.
BYBEE, NO. 3723; W. C. ROGERS, NO.

3725; C. H. JACK, NO. 3753; HUGH FINDLEY, NO. 3754; E. COLE THORNBURG, NO. 3756; IRVIN MILLER, NO. 3757; WAYNE AND ED KER, NO. 3761; MILO G. SAUL, NO. 3766; CHARLES F. CLINE, NO. 3770; C. A. CLINE, NO. 3773; ALBERT CLEMENTS, NO. 3776; E. H. TRAVIS, NO. 3782; JOHN ALLMER, NO. 3784; JOHN A. YBARZABAL, NO. 3788; JAMES A. DAVIS, NO. 3789; PAUL BUNCH, NO. 3794; J. C. SPROUL, NO. 3795; H. L. GALYEN, NO. 3796; OTTO HOLLODAY, NO. 3799; GROVER C. GOOD, NO. 3802; JESS RICH, NO. 3805; L. F. CODR, NO. 3806; GILBERT SPROUL, NO. 3807; ROY PEARCE, NO. 3810; TULLY A. GRIFFIN, NO. 3813; CLARENCE STELLING, NO. 3814; H. FRANKLIN, NO. 3815; I. H. FINDLEY, NO. 3816; HARRY H. SCHAFFER, NO. 3822; OTIS KING, NO. 3823; LAURENCE HOUSE, NO. 3825; LOREN HOPKINS, NO. 3826; EMMETT SMITH, NO. 3833; PETE SCHOORL, NO. 3834; ANNA DAVISSON AND CLOY TALBY, NO. 3838; R. E. FINDLEY, NO. 3840; LEM WILSON, NO. 3847; ORVAL E. GREEN, ET AL., NO. 3848; ISAAC MARLER, NO. 3862; and IRWIN TROXELL, NO. 3865.

Claimants and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

It Is Hereby Stipulated by and between the above-named Claimants and Appellants by P. J. Gallagher, of their counsel, and the Defendant and Respondent, United States of America, by Henry L. Hess, United States District Attorney for the District of Oregon, that the above-entitled Court may, if it seems proper to said Court, make its order consolidating all of the above-named causes for the purpose of hearing said appeals and that but one set of briefs and transcripts of record to cover all of all consolidated cases may be filed and that a single bond for covering all of said cases so consolidated on appeal may be filed, and that a single filing fee be paid, upon lodging said consolidated cases in the appellate court, if such practice meets with the approval of this Court.

/s/ P. J. GALLAGHER,

Of Counsel for Claimants
and Appellants.

/s/ HENRY L. HESS,

United States District Attorney for District of
Oregon.

[Endorsed]: Filed September 14, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR CONSOLIDATION OF ABOVE
DESCRIBED CAUSES FOR HEARING ON
APPEAL

To the Presiding Judge of the above-entitled Court:

Come now the above-named Plaintiffs and Appellants and respectfully show to the Court:

I.

That the above-named and numbered causes are a part of a total of 196 identical cases which were filed in the District Court of the United States for the District of Oregon, under the provisions of the Federal Torts Claims Act. That each of said cases involved are identical causes of law and fact, except for the item of damages claimed by the respective claimants.

II.

That when said causes were at issue an order consolidating said cases for trial was made and entered by the Hon. James Alger Fee, Judge of the District Court, in words and figures as follows:

“ . . . ; and it appearing from the pre-trial orders entered in each of the aforesaid cases that there are common questions of law and fact in both of these cases as to the duty, if any, owed by the United States to plaintiffs; and it further appearing that with respect to each of the aforesaid cases, there are common questions of law and fact relating to the alleged negligence

of the United States; and other questions of law and fact relating to the matter of liability, if any, on the part of the defendant, to plaintiffs.

It Is Ordered, by and with the consent of the attorneys of record in *the these* cases, that said cases be and the same are hereby consolidated for the purpose of trial of all of the issues of law and fact relating to the questions of duty and negligence and all other questions of law and fact relating to the matter of liability on the part of the defendant to plaintiffs, if any, to which reference has been made."

III.

That thereafter said Court made Findings of Fact and Conclusions of Law, upon which judgments were entered dismissing all of the foregoing cases, from which judgments the above-named Appellants have timely appealed to this Court, and said causes are now lodged in this Court.

IV.

That the questions of law and fact to be determined on this appeal are identical in each respective case and can be adequately presented by a consolidated transcript of the record and a consolidated brief and otherwise treated as a single case on appeal.

Wherefore, your petitioners pray for an order of this Court consolidating all of said causes for hearing on appeal and permitting the above-named Appellants to file a consolidated abstract of record and

a consolidated brief, and that it be further ordered that said Appellants be permitted to pay a single filing fee in this Court and furnish a single bond for costs.

This motion is based upon the facts set forth and Rule 42 (a) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ P. J. GALLAGHER,
Of Counsel for all of the
Appellants.

So Ordered:

/s/ CLIFTON MATHEWS,
/s/ WILLIAM HEALY,
/s/ WALTER L. POPE,
United States Circuit Judges.

Certificate of Mailing attached.

[Endorsed]: Filed September 14, 1950.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The Trial Court Erred:

1. In deciding the cases on the theory that Plaintiff had the burden of establishing defendant's negligence as the proximate cause of their damages rather than upon the theory that defendant failed

to perform its duty to deliver water for the irrigation of plaintiffs' lands.

2. In finding that the claimants had the burden of establishing the negligence of the defendant which resulted in defendant's failure to deliver water to claimants' lands.

3. In finding that the plaintiff had the burden of proving that the proximate cause of their damages was some negligent act of omission on the part of the defendant.

4. In failing to find that the proximate cause of plaintiffs' damages was defendant's failure to deliver water for irrigation of plaintiffs' lands.

5. In failing to find that defendant could not be relieved of its duty to deliver water to plaintiffs' lands because of the breaks in defendant's canal.

6. In finding that plaintiffs failed to establish that defendant was negligent in the construction, operation and maintenance of its canal.

7. In dismissing plaintiffs' cases and rendering judgment for the defendant.

Dated October 6th, 1950.

P. J. GALLAGHER,
Counsel for Plaintiffs in
Consolidated cases.

[Endorsed]: Filed October 24, 1950.

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS OPENING BRIEF

P. J. GALLAGHER
MARTIN P. GALLAGHER
Ontario, Oregon
Attorneys for Appellants

HENRY L. HESS, U.S. Attorney
Portland, Oregon

WILLIAM H. VEEDER, Special Assistant
to Attorney General
Washington, D.C.
Attorneys for Appellee

FILED

1955 JUN 21

PAUL F. O'BRIEN

CLERK

*Appeals from the United States District Court,
for the District of Oregon.*

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No. 12689

**United States
Court of Appeals
for the Ninth Circuit**

**SHEFF WHITE, ORLAND WHITE and JOE
M. WHITE,**

Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS OPENING BRIEF

*Appeals from the United States District Court,
for the District of Oregon.*

STATEMENT CONCERNING JURISDICTION

The complaints of appellants and some 196 other land owners and irrigators which were filed in the United States District Court for the District of Oregon allege that their action arose under the Tort Claims Act. Answers were filed and the cases put at issue. Jurisdiction of the District Court is based upon 28 U.S.C.A. Section 921 et seq.

An order was made consolidating the trials in all the cases for the purpose of determining the

general liability of the defendant and reserving the question of damages to await the determination of liability. (TR. 89)

A trial was had before the court beginning June 9, 1948 and continuing thereafter until the testimony was all in and thereafter on June 22nd, 1950, the court made and entered findings of fact and conclusions of law against the plaintiffs and final Judgment dismissing the plaintiffs complaint and awarding judgment to the defendant.

Thereafter notices of appeal were served and filed on August 21, 1950.

Based upon a stipulation of counsel this court made its order allowing all of the cases appealed to be consolidated for hearing in this court. (TR. 793)

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Title 28, U.S.C.A. section 1291.

STATEMENT OF THE CASE

The United States, through the Bureau of Reclamation constructed the Owyhee Irrigation Project in Oregon and Idaho prior to 1936.

There was the customary contract with various Irrigation Districts providing for the construction, repayment of construction costs and operating expenses, and also providing that the Secretary of the

Interior should have the exclusive operation and control of the project, and should deliver water for irrigation purposes during the period of its control. This contract is in the records and marked Plaintiff's Exhibit 1.

The North Canal distributes water to a majority of the project water users in Oregon, including the claimants.

At all of the times involved, the Reclamation Bureau has been in exclusive control of the operation of the project and all of the physical properties involved and the transportation and delivery of water to all the land owners. On July 14, 1946, there was a break in the North Canal which was not completely repaired until July 31, 1946.

Some 196 water users filed claims against the United States under the provisions of the Torts Claims Act alleging damages to their crops because of the shortage of water for irrigation. Two other land owners filed claims for damages because of flooding their property.

The issue of liability on all the cases was tried to the court without a jury, with the proviso that the trial on the issues of damages would await the decision on the question of liability.

In an opinion filed March 13, 1950, (TR. 57) the court held the defendant liable on the two cases involving flooding the land, but held that the evidence adduced by the claimants was not sufficient to es-

tablish their right to damages because of water shortage, and later, on June 22, 1950, the court made and filed its Findings of Fact, Conclusions of Law and a Judgment Order dismissing all of the shortage of water cases.

This appeal is from the court's judgment of dismissal.

Later the court fixed the damages against the defendant on account of flooding the land of the two claimants claiming that loss of damage.

STATEMENT OF FACTS

The Owyhee Irrigation Project was constructed by the Secretary of the Interior through the Agency of the Bureau of Reclamation. It furnishes water for irrigation to a large area in Malheur County, Oregon, and in Western Idaho.

It was constructed and has since been operated, exclusively, by the Secretary of the Interior and Bureau of Reclamation as a government project.

The North Canal is a part of the Owyhee Irrigation Project, and serves a large area of land in Oregon. It has a rated capacity of 1100 second feet at the head of the canal where the water is discharged from the Owyhee Dam. This diminishes as water is discharged into lateral ditches to where the capacity is about 700 second feet at what is known as Lockett Spillway, and 450 second feet at

mile post 36 (36 miles below the head). At this latter point a break occurred on July 14, 1946, and after repair, another break occurred down stream on July 19th, the broken portions joining each other. Water was out of the canal until July 31, 1946.

Farmers below this point on the canal were without water for irrigation during this period and some 193 of the farmers filed claims for damages under the provisions of the Federal Tort Claims Act.

At the point of the breaks the canal is constructed along a hillside some 200 feet above the level of the valley and for some 600 feet over and through stratum of wind and water deposited gravel and sandy constructed earth, broken up, and generally porous material. The canal was unlined at this point.

For some two years prior to 1946 there had existed several well defined and active "seeps" in the area immediately adjacent to the outer and lower bank of the canal and on either side of the point where the canal broke.

At the immediate point of the first break the outer bank of the canal was partly "in fill" that is, built up over the normal ground level. Prior to 1944 several obvious leaks or seeps developed in lands adjacent to the canal above the point of the break and a large seep some 300 feet below the break.

During 1945 and 1946, (prior to the break) a

boggy, water soaked condition developed in an area of some four acres of land opposite the point of the break commencing immediately under the toe of the canal bank and extending some 300 feet away from the canal.

This condition became so bad that parts of the land could not be plowed, nor the crops harvested by ordinary means because of the swampy condition of the land. Water rose to the surface on this area, and in a small ditch immediately under the toe of the canal.

On July 14th, some time about noon the canal failed at this point immediately above the seeped area and a large segment of the lower bank was washed away.

The canal was carrying 450 second feet of water at this point.

After the break it was discovered that the base of the canal was water soaked down below the bottom of the canal for a distance of several feet.

After the break the supply in the canal above the break was diminished by opening spillways and building check dams, and, as soon as the flow stopped, repairs were started and carried on until about July 18th at about 7:30 P. M. when an attempt was made to again carry water through the canal. The repair was not completed at that time and the floor of the canal was still far below normal grade. On that occasion a large head of water was

released above the point of the break with the result that it overflowed the newly constructed part of the canal, and, finally, about 1:30 A. M. on the 19th another segment of the canal downstream, and immediately adjoining the place of the first break, gave way and was completely washed away. This segment was so badly water soaked that it would not sustain the canal structure. After the water drained out of the canal repair work was again started and was completed on July 31st at which time water services were renewed.

During the interim plaintiffs land planted to various agricultural crops was without water for irrigation, for which damages were claimed because of the failure of the defendants to deliver water.

QUESTIONS INVOLVED

1. Whether the court erred in determining defendant's liability on the basis of negligence, instead of on the basis of failure to perform its duty to deliver water to claimants.
2. Whether the court erred in not requiring the defendant to establish an adequate defense for its failure to deliver water to the claimants for the irrigation of their lands, in accordance with its duty to the claimants.
3. Whether the court erred in dismissing appellants claim in the absence of any finding that de-

fendant exercised due care in the performance of its duty or in the absence of any finding of fact exonerating the defendant for its failure to deliver water to the claimants.

4. Whether the court erred in failing to find that the defendant had an absolute duty to deliver water to the claimants, or respond in damages for its failure to do so.

5. Whether the court erred in dismissing appellants claims, when it did find that defendant had the exclusive management and control of the project and had the duty to deliver water, and failed in that duty.

6. Whether the court erred in placing the burden on appellants to show that defendant was not justified in failing to deliver water to the appellants.

7. Whether the court erred in holding that appellants did not establish a lack of due care on defendant's part in the construction, operations, management and inspection of the North Canal. (Finding No. 13, TR. 95)

8. Whether the court erred in finding that the defendant was not bound to anticipate the breaks and the plaintiffs have failed to establish by a fair preponderance of the evidence that the defendant had such knowledge or information as would cause it to anticipate such breaks and the defendant in the exercise of ordinary care was not bound to an-

anticipate that breaks would occur. (Finding 14, TR. 95)

9. Whether the court erred in finding that at the time the first break was repaired, the defendant did not know the cause of the first break, and that defendant did not know of anything that would cause it to anticipate the occurrence of the second break. (Finding No. 16, TR. 96)

10. Whether the court erred in finding that the evidence adduced by plaintiffs failed to establish the cause of either the first or the second break in the North Canal. (Finding No. 17, TR. 96)

11. Whether the court erred in finding that plaintiffs failed to prove that the defendant did not use reasonable care in the construction, maintenance, operation, inspection or repair of the North Canal. (Finding No. 18, TR. 96)

12. Whether the court erred in failing to apply the rule of *res ipsa loquitur*, in determining the liability of the defendant as to both breaks in the North Canal and also as to the failure of the defendant to perform its duty to deliver water to claimants.

13. Whether the findings of the trial court are not clearly erroneous.

14. What is the liability of an agency that contracts to deliver water for irrigation, and fails to perform the contract?

15. What burden of proof does a water user have to meet in an action for damages for failure to deliver water for irrigation?

16. What defences does such an agency have against an action for damages by a water user who has not received the water contracted for?

SPECIFICATIONS OF ERROR

The Statement of Points on which appellants intend to rely on appeal was filed by attorneys for appellants on October 6, 1950, and is incorporated in the Transcript on Appeal. (TR. 798)

We hereby restate our specifications of errors for the purpose of clarity, and expediency in presenting our argument.

The trial Court erred :

1. In deciding the cases on the theory that plaintiffs had the burden of proving defendant's negligence in failing to perform defendant's contractual duty to deliver water to plaintiffs for irrigation.

2. In finding that plaintiffs had the burden of proving that the proximate cause of their damage was caused by some negligent act or omission of the defendant.

3. In failing to find that defendant had the bur-

den of proving the proximate cause of its failure to deliver water to plaintiffs for irrigation.

4. In failing to find that the proximate cause of plaintiffs damage was defendant's failure to deliver water to plaintiffs lands for irrigation, and that defendant was liable for damages because of such failure.

5. In failing to find that defendant could not be relieved of its duty to deliver water to plaintiffs lands because of the breaks in defendant's canal.

6. In finding that plaintiffs had not met their burden of proof of defendant's negligence in the construction, operation, maintenance and inspection of its canals.

7. In dismissing plaintiffs cases, and rendering judgment for the defendant.

Finding No. 11 (TR. 95) is in error, because it places the burden of proof on the plaintiffs of proving why defendant failed in its duty to deliver water to plaintiffs lands for irrigation.

Finding No. 12 (TR. 95) is in error for the reason that it limits the duty of defendant to the exercise of reasonable care in performing its contract with the plaintiffs to deliver water for irrigation.

Finding No. 13 (TR. 95) is in error because it finds that plaintiffs failed to prove that the defendant exercised due care when:

(a) There was no duty of that nature on plaintiff; and

(b) Because the court failed to find defendant had used due care.

Finding No. 14 (TR. 95) is in error because it finds that defendant was not bound to anticipate breaks; and that

(a) Plaintiffs had the burden of proving that defendant had knowledge or information to cause it to anticipate breaks.

Finding No. 16 (TR. 96) is in error in finding that prior to the second break, defendant did not know the cause of the second break for the reason that such finding relieves the defendant from:

(a) The duty of making any inspection of the premises,

(b) The obligation of taking heed of conditions plainly visible, and of conditions wholly within the control of the defendant.

Finding No. 17 (TR. 96) is in error in holding that the evidence of the plaintiff failed to establish the cause of the first or second break, because:

(a) The burden of showing the cause of the breaks was not on the plaintiffs; and

(b) The testimony in the record clearly establishes the cause of both breaks, and such testimony is uncontradicted and in agreement between the parties.

Finding No. 18 (TR. 96) is in error because it finds that plaintiffs failed to prove that defendant did not use reasonable care in the construction, maintenance, operation, inspection or repair of said canal when:

- (a) That burden was not on the plaintiffs; and
- (b) The testimony, direct and circumstantial, and every reasonable and logical inference to be drawn therefrom proves by a preponderance, that the defendant failed in its duty in each and all of the above respects.

The Conclusions of Law are in error in the following respects:

Conclusion No. 2 (TR. 97) is in error because it is based on an erroneous Finding of Fact that:

- (a) The burden of proof was on plaintiffs to establish that the proximate cause of plaintiffs damage was some negligent act or omission of the defendant, other than the duty of defendant to deliver water and the failure of that duty, which is admitted.

Conclusion No. 3 (TR. 97) is in error because it is based on the assumption that plaintiffs evidence did not establish the negligence of the defendant.

Conclusion No. 4 (TR. 97) is in error, because it is based on the assumption that plaintiffs failed to establish that defendant did not exercise due care in the respects mentioned because:

- (a) Plaintiffs did not have that burden, and
- (b) The testimony in the record proves by a preponderance that defendant failed to exercise due care in the respects mentioned.

Conclusion No. 5 (TR. 97) is in error because:

- (a) Plaintiffs had met the burdens of proof imposed by law upon them; and
- (b) Defendant had failed to meet any of the burdens imposed upon it by the contractual obligations to the plaintiffs and was liable to plaintiffs for such failure.

ARGUMENT

In presenting argument we shall endeavor to follow the chronological order of the questions involved, as above set forth.

THE DEFENDANT HAD THE DUTY TO DELIVER WATER TO THE CLAIMANTS FOR THE IRRIGATION OF THEIR LANDS

In approaching this problem it is well to have in mind the status and liability of the defendant in relation to its duties and burdens in operating the Owyhee Project.

We take its status to be established by the opinion of the Supreme Court of the United States in *Ickes vs. Fox* 300 U. S. 82, 81 L. E. 525, where we read: (530 L. E. cit.)

“The Government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.”

This language was repeated in *Nebraska vs. Wyoming*, 325 U. S. 588, 89 L. E. 1815, (1829 L. E. cit).

The defendant constructed and had always been in the exclusive control of the Owyhee Project, and of the North Canal, at the time of the break, and was, therefore, solely responsible for the manner of its construction, maintenance and operation, and for the delivery of water to claimants. (Finding No. 9, TR. 94)

Under the terms of the Tort Claims Act, the defendant would be liable:

“For injury or loss of property caused by the negligent or wrongful act, or omission of any any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” (28 U.S.C.A. 1346)

The court found that there was a duty on the defendant to furnish water to the claimants for irrigation purposes. (Finding 12, Tr. 95) Therefore, we can epitomize the position of the defendant as a carrier of water with the contractual duty to deliver water to claimants for irrigation purposes,

and the imposed duty to maintain its system in such a condition as to enable it to perform its obligation.

As a result of the two breaks in the North Canal no water was delivered to claimants from July 14th to July 31st, 1950. Hence, there was an "omission" to perform its contractual duty.

Having failed in its contractual duty, the burden is on the defendant to exculpate itself from liability, and claimants do not have the burden of negating exculpatory facts in making out their case.

In *Long on Irrigation* (2nd Ed) 520, Section 294, we read:

"Where, in an action against an irrigation company for failure to furnish water according to contract, the agreement to furnish water and the failure to do so are proved, it devolves upon the defendant to explain such failure, the sufficiency of the explanation offered being a question for the jury."

In *Kinney on Irrigation* (2nd Ed) Vol. 3, P. 3066, Section 1668, we read:

"Where the duty to furnish the water is imposed by a contract between the company and the consumer, in a proper case, the courts will enforce such contracts, either by decreeing specific performance of the same, or, in some jurisdictions, by mandamus. And, if there is a breach of the contract, and the company obligated therefore fails to furnish the water, the consumer may maintain an action for damages."

In 67 C.J. 1429, Section 1100 we read:

“A distributor who is under a legal duty to furnish to a customer a given quantity or supply of water for irrigation may be answerable in damages for the loss or injury caused by its failure to do so. * * * ”

The foregoing text is so well fortified with authorities from western states, as to make citation thereof unnecessary.

THE COURT APPLIED THE RULES OF LAW AND EVALUATED THE EVIDENCE ON THE BASIS OF A PURE TORT INSTEAD OF ON THE BASIS OF OMISSION TO PERFORM A CONTRACTURAL DUTY. THIS WAS ERROR.

By its Findings 11, 13, 14 and 18 (TR. 95-96) the court placed the burden on the claimants of establishing the reason why water was not delivered. As a matter of law, it was the burden of the defendant to establish the fact that the failure to deliver water was due to causes beyond its control or some other sufficient reason why it should be exonerated from its failure.

Pointing out the difference between “commission” (positive wrong) and “omission” (breach of duty) the author of *Street's Foundation of Legal Liability* says: (pp. 87 Vol. 1)

“In one aspect the law of negligence finds its affinity in pure tort, in another aspect it finds its affinity in the law of contract. The subject of negligence is bisected, we affirm, by the most fundamental seam known to legal theory. In one part and from one point of view the law of negligence is controlled by and subject to principles which have been worked out in the field of pure tort; while in another aspect, and from another point of view it is controlled by principles which have been worked out in the field of contracts.”

In *38 Am. Jur. 662*, Section 20 we read :

“Accompanying every contract is a common law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.”

“The sound rule appears to be that where there is a general duty, even though it arises from the relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent non-performance, the breach of the duty may constitute actionable negligence.”

Here, however, there was more than the common law general duty that accompanies every relationship, where one party undertakes to perform an act. There is a contractual obligation based upon a sufficient consideration which bound the defendant to perform. The following cases speak for this rule.

Among the leading authorities on this point is *Preston vs. Farmers Irrigation Dist.* (Nebr.) 293

N. W. 243. There was a verdict and judgment for the plaintiff-respondent and the defendant-appellant complained that there was no evidence as to the amount of seepage and evaporation, which, it was contended, would affect appellant's ability to perform its contractual duties. We read: (244 N. W. cit)

"Defendant insists, however, that, whatever the quantity of water in the canal may have been, plaintiff did not attempt to prove the amount of the probable carriage loss from evaporation and seepage, and so did not establish what the actual amount of natural flow water was that could have been delivered to him, and that he therefore did not sustain the burden of proof which rested upon him.

(1, 2) *Ft. Lyon Canal Co. v. Bennett*, 61 Colo. 111, 156 P. 604, 607, is cited in support of defendant's contention. In that case it was said: 'Whether there was a sufficient volume of water in the canal at the time plaintiffs needed it was a vital issue * * * upon which they had the burden of proof.' That was an action in tort, against a third party with whom no contractual privity existed, for negligent interference with a lateral that led from the water canal to plaintiff's lands. Here, the action is one for breach of a contract to deliver water, in which defendant seeks to justify non-performance, in part at least, on the ground of a 'supervening impossibility.' (*Restatement*, (2) *Contracts*, Sec. 457), in the nature of what is sometimes loosely referred to as a 'vis major' or an 'act of God.' The burden of exonerating itself from the obligation of a contract on such a ground rests on the defendant. *Buel v. Chicago, R.I. & P.R. Co.*, 81 Neb. 430, 116 N.W.

299. An irrigation company which seeks, on the ground of a supervening impossibility, to excuse its failure to deliver water pursuant to the terms of its contract obligation is within the operation of this rule. 3 *Kinney, Irrigation and Water Rights*, 2d Ed., 3124, Sec. 1693; 67 *C.J.* 1438, note 67; 15 *R.C.L.* 481, Sec. 34. In this case, therefore, the burden rested upon defendant, and not on plaintiff, to show the quantity of water that it was possible to have delivered to him after taking into account all pertinent factors, including carriage loss from evaporation and seepage. Plaintiff established a prima facie case when he proved defendant's failure to deliver the quantity of water required by his contract and the extent of the damage to his crops and land from the failure to receive such a supply."

The court then quoted from *Tapper vs. Idaho Irrigation Co., Limited*, *infra* and cited the other Idaho cases to which we call attention, and concluded on this point with the following language: (245 N.W. cit.).

"We accordingly hold, that plaintiff was not required to produce proof of the extent of the carriage loss in defendant's canal, in order to sustain the burden of proof which rested upon him in this case."

In *Tapper vs. Idaho Irr. Co.* (Idaho) 210 P. 591, the Idaho Court took the rule from *Taylor vs. Caldwell* 3 B & S. (Bert & Smith) 122 Engl. Rep. Reprint 6, Eng. Rul. Cases 611, 826 and quoted to the effect: (596 Pac. Cit.)

“ ‘Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome, or even impossible.’ ”

Further supporting the rule the Idaho court cited *Berg vs. Erickson* 234 Fed. 817, where Judge Sanborn reviewed the cases, State and Federal, including several decisions of the United States Supreme Court which support the legal premise that when parties agree, without exception, to perform a contract, lawful and possible of performance when entered into, subsequent hardship to the point of impossibility will not relieve the party in default from damages.

This rule of law was applied to an irrigation case by the Supreme Court of California in *Sample vs. Fresno Flume and Irrigation Co.* 61 Pac. 1085, where the water company pleaded an injunction against it in private litigation. The court cited *The Harriman*, 9 Wall, 172, 19 L. Ed. 629, and quoted from *Transportation Co. vs. O'Neil*, 98 Calif. 5, 32 Pac. 706, to the effect: (1087 Pac. Cit)

“ ‘Where a party has expressly undertaken, without qualification, to do anything not naturally or necessarily impossible under all circumstances, and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which

he had no control, but against which he might have provided in this contract.' ”

By the foregoing authorities the defendant had the burden of going forward with evidence showing a valid reason why it had not delivered water through the month of July.

There is a definite distinction between actions against a ditch company for damages caused by seepage, and an action for damages because of a failure to perform a contractual duty. Allowing water to seep from a ditch to another's injury is a pure tort requiring the proof of negligence, while failure to deliver water although a tort, is a breach of a contractual duty and does not require an injured person to negative due care, or any defense the defendant might have. Of course the breach of a positive duty may result in a tort but when an injured party establishes the duty and a violation thereof he has made a *prima facie* case for recovery without sustaining the burden of showing why the defendant violated the duty.

Kinney, Vol. 3, 3067-3068:

“Where there is a duty to furnish water, a refusal or failure to furnish the same gives concurrent remedies in tort and contract, and the consumer may recover in either form of action.” (citing cases)

In *38 Am. Jur. 661, Section 20*, we read:

“Ordinarily, a breach of contract is not a tort, but a contract may create the state of things

which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract. In such a case, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care."

A leading case interpreting this text is *Dustin vs. Curtis* (N. H.) 67 At. 220; 11 L.R.A. (N.S.) 504 (506), which defined negligence as:

"Actionable negligence is the neglect of a legal duty * * * To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty."

**IT WAS ERROR TO DECIDE THE CASE ON
THE ISSUE OF FAULTY INSTRUMENTALITIES
EMPLOYED BY DEFENDANT IN PERFORMING
A CONTRACT TO DELIVER WATER.**

There was another and further misapplication of legal principles by the Court in applying the rule of evidence and burden of proof required by a pure tort action, to a case involving a breach of contract.

In *Cameron County Water Improvement Dist. No. 1 vs. Parkhurst* 46 S.W. (2) 472, the Texas Court of Civil Appeals wrote:

“Let it be granted that appellant had made a legal contract to furnish water to appellee: still, if any damages were inflicted on appellee, they must have arisen from a failure to furnish water, and not on account of defects in a flume through the railroad embankment, nor any other defect in the instrumentalities used by appellant. The question of a failure to furnish water to appellee was not presented to the jury by the court, the only two issues being:”

And quoting the alleged negligent acts submitted the court continued:

“If damaged at all, appellee was damaged by a failure to obtain water at the proper time from appellant, no matter what caused such failure to furnish water, which would be the direct and proximate cause of the damages. This proximate cause was never submitted to the jury, but the case was made to turn on the defective condition of some agency employed by appellant to furnish water. The court ignored the question of water and made the whole case revolve around the defective flume. It is evident that there has been no legal trial of the cause.”

The Court having found that there was a positive duty to deliver water, and likewise a failure to do so, claimants had a prima facie case and it was error to dismiss because we failed to satisfy the court that

defendant in breaching its duty did not exercise due care.

The burden of showing due care, or any other defense for its failure was an affirmative defense and the burden on defendant.

United States vs. Bethlehem Shipbuilding Corp.
25 Fed. (2) 157, 158:

“It is firmly established that one who is negligent in the performance of a legal duty is liable for the proximate consequences of such negligence. This being true, it is immaterial whether such legal duty arises by virtue of a contract or a relationship, for in the former case, as well as the latter, the defendant is liable on the basis of tort for his failure to measure up to such duty.”

CLAIMANTS ESTABLISHED A PRIMA FACIE CASE WHICH WAS NOT CONTROVERTED OR DISPROVED.

When the claimants established the duty of the defendant to deliver water, and the fact of non-delivery, they made out a prima facie case, entitling them to such damages as they could establish.

In *Tapper vs. Idaho Irr. Co.* (Idaho) 210 Pac. 591 (597), the court said:

“The appellants made a prima facie case by proving the contract and failure to deliver water in accordance with its terms and consequent damages to their crops, together with the

amount thereof. It was incumbent upon respondent to prove the failure of the water supply on account of an extraordinary drouth,
* * * ”

This decision was followed by the same court in *Edholm vs. Idaho Irr. Co. Ltd.* 214 Pac. 1036, where there was a reversal because of an instruction which placed the burden on the plaintiff of establishing that the defendant “had a water supply which was available to the defendant for distribution to plaintiff, but that the defendant company failed and neglected to do so to plaintiff’s injury.”

See also, on this point, *Meservy vs. Idaho Irr. Co.* 217 Pac. 595 (596).

“This objection is disposed of by saying that the failure of water supply was a matter of defense to be shown by the appellant. * * * ”

Further expression on this point is *Preis vs. Idaho Irr. Co.* (Idaho) 215 Pac. 466 where we find the above quotation from the Tapper case, and the following statement in the cited case:

“On the retrial if appellant (water user) makes proof of his case in accordance with the above rule, then respondent (Irr. Co.) will be required to put in its defenses, and it will be a good defense if it proves that its failure to furnish the contract amount of water to appellant was due to an extraordinary drought, and that it delivered to appellant his just proportion of the water supply that it had.”

In 17 C.J.S. (Contracts) p. 1230 Section 590 (b) we read on page 1231:

“A party who asserts that performance of the contract on his part has been excused has the burden of establishing the facts relied upon for such excuse; and, after proof of the execution of the contract and the breach by defendant, the burden is on defendant to show an excuse for the breach.”

This is in accordance with the general rule governing liability on contractual relations.

In 17 C.J.S. (Contracts) P. 1216, Section 578, we read:

“Where, however, a party having the affirmative of the issue has made out a prima facie case, the burden of evidence, as distinguished from the burden of proof may shift to the adverse party; * * * ”

Among the many cases supporting this rule of law is *Lemdbloom vs. Fallett* 145 Fed. 805, (808) (9th Circuit), the opinion by Judge Gilbert who approved an instruction in which the court said:

“You are instructed that in this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his complaint and reply. On the other hand, the affirmative of the issues is upon the defendants to establish the matters and things alleged in their affirmative defense.”

We are unable to find any authority which would justify a finding that claimants have the burden of proving the reason why defendant failed to perform its contractual duty to deliver water.

The rule in Oregon is clearly stated in a carrier case in *Carroll vs. Royal Mail Steam Packet Co.* 130 Oregon 294, 279 Pac. 861, where it used the following language found in *Jones Commentary on Evidence*, Section 182 (864 Pac. Cit)

“ * * * When the prima facie case is established, the burden of evidence shifts to the carrier, who is to prove that the loss arose from some cause for which he is not liable * * * the limitation of his proof, or rather of his exoneration, to excepted cases only makes the shifting of the burden idle for the excepted cases are really his affirmative defense.”

The rule of responsibility for a contractual duty in the State of Oregon was announced by the Supreme Court in *Pengra vs. Wheeler* 24 Oregon 532, 34 Pac. 354 in the following quotation from *Dermott vs. Jones* 2 Wall. 1: (356 Pac. Cit.)

“It is a well settled rule of law that, if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.”

The burden of establishing some legal and adequate defense for the nonperformance of its duty rested on the defendant. It was error to place that burden on the claimants to show a lack of due care, or whatever defense the defendant might have elected to put forward.

The foregoing demonstrates a misapplication of law that justifies setting aside the judgment of dismissal.

**THERE WAS A LEGAL LIABILITY UP-
ON THE DEFENDANT TO MAINTAIN
ITS DITCHES AND DIVERSION WORKS
IN SUCH CONDITION AS WILL ALLOW
THE PERFORMANCE OF ITS CON-
TRACT.**

In *Niday vs. Barker*, 101 Pac. 254, the Supreme Court of Idaho announced the controlling rule of liability in the following language: (256)

“The question is also presented here, and the contention is made, that the District should not be required to furnish respondent with water, because there is such an enormous seepage and evaporation in this five miles of high-line lateral that it is next to impossible to deliver water at respondent’s farm. The evidence to that effect was offered and rejected by the court. It does not seem to us that that was a proper or material issue. It was established, and the court so found, that the canal company had in previous years actually delivered the water through this lateral to the respondent. The fact that the seepage became greater and the loss of water increased in subsequent years should not be charged to the landowner. The duty devolves upon the ditch company to maintain and keep in repair its ditches, canals, and laterals. The owner of such property must necessarily keep it in repair. Section 3307, Rev. Codes; *Bothwell v. Consumer’s Co., Ltd.*, 13 Idaho 568,

92 Pac. 533; *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518."

Reference is made to the Idaho Code, which is presently Section 42-1202 Idaho Code and provides:

"The owners or persons in control of any ditch, canal, or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, * * * "

This is a counterpart of Secs. 116-408 and 116-409 O.C.L.A. which provide:

"Every corporation constructing a ditch or canal, flume, or reservoir, under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume, or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributable in whole or in part to the wrongful interference of another with said ditch or canal, flume, or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporation." (Sec. 116-408)

"Every corporation constructing a ditch or canal or flume under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and

from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand." (Sec. 116-409).

The Oregon statutes thus prescribe a standard of care to be exercised by water serving agencies.

Colorado has a similar statute (Gen. L. 1883, Section 212) which was interpreted in *Greeley Irrigation Co. vs. House* (Colo) 24 Pac. 329 in the following language: (331)

"It can, without doubt, be said that the defendants are responsible for any damage occasioned to plaintiff's property by reason of their failure or neglect to keep the ditch in a state of preservation and repair, and to so maintain and manage the ditch as to prevent injury to plaintiff's property while they so use and control the same; and for any injury to the plaintiff's property caused by overflow of the waters entering the ditch, resulting either directly or indirectly from the negligence of defendants in keeping the same in good repair, or in the manner of its use while under their control, they are responsible in damages. *Richardson v. Kier*, 37 Cal. 263. If there was a failure on the part of the defendants to comply with an express requirement of the statute in the construction, maintenance, or use of this irrigating ditch, whereby injury resulted to the plaintiff, there can be no question but plaintiff is entitled to recover. In *Wilson v. Turnpike Road*, 21 Barb. 68, it was held that an 'omission to comply with the statutory requirement is a nuisance for which a party injured without negligence on his part may claim damages.'"

This case was followed with similar holdings, in

the later cases of *Larimer County Ditch Co. vs. Zimmerman*, 34 Pac. 1111; *Garnet Ditch and Reservoir Co. vs. Sampson* 110 Pac. 79; and *Beaver Water & Irrigation Co. vs. Emerson* 227 Pac. 547.

The Colorado statute was enacted in 1883 and the Oregon statute in 1891 and judging from the almost exact language used and the purposes to be accomplished, it can be strongly inferred that Oregon adopted the Colorado statute, and should follow its interpretation by the Colorado Court.

The reclamation of arid lands is a very important element of our western economy. It involves the investment and labor of many thousands of farmers, running through several generations. Nearly 200 were affected by the break of the North Canal on the present occasion. It is but reasonable that the legislature should require of those responsible for the project a higher and more definite degree of care than is encompassed in the fluid definition of that of the "ordinary prudent man."

Thus, in *Sullivan vs. Mountain States Power Co.* 139 Oregon 282, 9 Pac. (2) 1038, the court said: (1047 Pac. Cit)

"Clearly, the legislature had a right to exact a higher degree of care than the standard conduct of a reasonably prudent person."

When the United States entered into the business of a common carrier of water for irrigation pur-

poses, it brought its activities under the rule of care required by the statute.

Likewise, under the terms of the Tort Claims Act it would be liable to the same extent as would a private person.

The cardinal purpose of the enactment is to require stable and safe ditches and canals.

If there was a break causing loss of property by flooding, the liability would be absolute and the trial Judge so found. A loss of any other nature, proximately caused by the same reason, should be governed by the same rule.

The duty to construct and maintain a canal in condition to fulfill a contractual obligation is just as important as it would be to prevent damages by flooding caused by the failure of the same canal.

**IT WAS ERROR TO LIMIT DEFENDANT'S
DUTY TO DELIVER WATER, TO THE
EXERCISE OF "REASONABLE
CARE."**

The Court found: (Finding 12, TR. 95)

"It was the duty of the defendant to exercise reasonable care in the operation of the North Canal to enable it to deliver water to the plaintiffs for irrigation purposes."

Reasonable care is not enough to excuse the performance of a valid contract, or to avoid damages for a breach thereof.

17 C.J.S. (Contracts) P. 953, Sec. 463:

“Where performance becomes impossible subsequent to the contract, the general rule is that the promisor is not thereby discharged and this is particularly true as regards a promisor with knowledge of facts from which impossibility of performance might have been foreseen.”

In 12 Am. Jur. (Contracts) 928, Sec. 352, we read:

“Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful.”

In 17 C.J.S. 949, Sec. 459, we read:

“*Act of party himself.* The promisors breach of an unconditional contract cannot be excused by any act of his own or of those in privity with him which prevents performance or renders it impossible.”

And further in the same Text:

“*Exercise of ordinary care and good faith.* It is not sufficient that the party shall have exercised ordinary care to perform, but nevertheless failed. So, the fact that a party has acted in good faith and exercised due diligence will not excuse delay.”

In *Jonesboro Compress Co. vs. Mento & Co.* 72 Fed. (2) 3 we read: (5)

“The only rule of law which it seems necessary to apply to this case is that rule which requires men to fulfill the contractual obligations which they assume. This rule has been stated by the Supreme Court of the United States as follows: ‘It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.’ *Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762.”

Several other decisions of the Supreme Court are cited.

Contracts to deliver water are measured by the same rule of liability as indicated by authorities *supra*.

It was error to absolve the defendant from liability even upon a showing of due care, and it was a greater error to dismiss claimants action *without finding that defendant had exercised due care*.

Reid v. Alaska Packing Co. 43 Oregon 429 at 436, 73 Pac. 337:

“ ‘The rule to be deduced from the authorities is that, if one enters into a valid contract, for a sufficient consideration, to do a lawful thing, possible in itself—that is, in the nature of things—to be done, he must either carry out the contract according to its terms or answer in damages for a failure to do so. The mere impossibility of performance in fact will not be enough, but the contract must be

obviously impossible upon its face before such a defense can be made.'”

CONSTRUCTING A CANAL OVER POROUS MATERIALS WITHOUT LINING IS NEGLIGENCE.

Every authority on this subject holds that to construct a canal through material such as the present record disclosed without any attempt to seal the pervious spots is negligence.

In *Kaylor vs. Recla*, 160 Oregon 254, 84 Pac. (2) 495, the Supreme Court of Oregon epitomizes the principle in the following language: (497 Pac. Cit)

“Defendants’ act of constructing their ditches through soil naturally incapable of retaining water, without the employment of any means to prevent seepage or percolation constitutes negligence.”

The Oregon court cited among other authorities *Tormey v. Anderson Cottonwood Irr. Dist.* (Calif.) 200 Pac. 814 from which the following quotation is taken: (262 Ore. Cit.)

“To knowingly construct a canal through loose sand or gravel incapable of holding water, in a situation such as that disclosed here, without taking any steps to prevent or control seepage therefrom, would constitute negligence. (Citing authorities)”

The Oregon Court also uses a quotation from *Kinney on Irrigation*, Section 1675 to the effect:

"The seepage of water from ditches, canals, or other works, is but one method of its escape from such works. Therefore, the same duty devolves upon the owner of such works to so construct them as far as possible so that the water will not seep or percolate therefrom to the injury of the lands of others below. * * * "

To these cases may be added:

Shields v. Orr Extension Ditch Co. (Nevada) 47 Pac. 194, where we read: (195)

"It was shown at the trial that the ditch of the defendant was upon a hillside sloping towards the lands where the damage complained of occurred. The ground through which the ditch ran was rocky and porous, and water constantly escaped, with the knowledge of the defendant, during the irrigation season, when the ditch was full; not by means of overflow, but by seepage and leakage through its banks. These facts were uncontroverted at the trial.

* * *

There was no testimony tending to show that the escape of water was the result of accident; on the contrary, the uncontradicted testimony showed a constant escape of water during the irrigating season, with defendant's knowledge."

And from *Kall vs. Carruthers* (Calif) 211 Pac. 43, the following quotation is taken: (44)

"No essential difference is usually recognized between damages caused from surface overflow and damages caused by direct percolation, reasonably traceable, whether the construction was apparently reasonably sound originally, or apparently originally imperfect. Whether the seeping nature of the soil is known or un-

known at the time of construction, the responsibility is usually held to be the same; it must be remedied by effectual intercepting trenches, by cementing, or by other means known to science. In other words, the artificial receptacle for holding the liquid, be it of whatever form or nature, must be made and maintained as nearly waterproof as human agency can reasonably and prudently make it. Otherwise, if the escaping water results injuriously by reason of the receptacle failing to properly hold the water, it then falls within the category of nuisances, or under the condemnation of negligence."

We maintain that this reasoning applies to a ditch break that causes damages from failure to deliver water as well or even more so, to a break or seep that causes damages to the land affected by flooding or seepage.

The Court continued:—(44)

"In the case now under consideration we may very properly liken the receptacle holding the water on the rice to a large reservoir (or to a 'pool' as described in the case of *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30) in area, though not in depth, but being one constantly replenished in order to maintain an even depth for many months, thus keeping a perfect saturating medium on the ground to run or seep into the ground any place or anywhere that water will naturally flow; the sides and bottom of this receptacle having the usual defects common to uncemented ditches, reservoirs, dams, and drains, in being not waterproof or sufficiently so to reasonably retain the impounded water.

“The liability of the water to do injury if allowed to escape must be continually borne in mind by the one attempting to make artificial use of it, and his failure to bear that fact in mind may be material upon the question of his liability.

“The fact that water in small quantities may be handled without doing material injury to adjoining property brings such cases ‘peculiarly’ under ‘the application of the principle that the injury itself is evidence of negligence.’ This is well stated in a note in 1 L.R.A. (N.S.) 596 as follows:

“ ‘The persistence with which water will seek its level renders the artificial accumulation of it above the ordinary level of the surrounding country more or less dangerous, according to the quantity of water accumulated and the susceptibility of adjoining property to injury in case of its escape. The result is that there has been some tendency on the part of the courts, as represented in the case of *Rylands v. Fletcher*, L.R. 3, H.L. 330, 37 L.J. Exch. (N.S.) 161, 19 L.T. (N.S.) 220, to hold one who accumulates water in large quantities as an insurer. On the other hand, water may be accumulated in small quantities without material danger to adjoining property. At the same time, the very facts that that is so, and that ordinary precaution will prevent injury from the accumulated water, render the case peculiarly one for the application of the principle that the injury itself is evidence of negligence.’ ”

The Supreme Court of Wyoming, in *Howell vs. Big Horn Basin Col. Co.* 81 Pac. 785, where the trial court had found a lack of negligence, reversed the judgment, and said: (791) Pac. Cit)

“If the company saw fit to construct its ditch through soil naturally incapable of holding water, it should at least have made all proper and reasonable efforts to prevent seepage therefrom. Failing to do so, it was clearly negligent. (Citing authorities) In *Reed v. State*, supra, the New York Court of Appeals said: ‘The attempt to collect a large body of water into a limited space surrounded with a porous and gravelly soil, without taking adequate precaution to confine it to the receptacle prepared for it, was, upon the face of it, an inexcusable act of negligence in those having charge of such work, and cannot be justified under the known laws governing the motion of fluids.’ ”

The Wyoming Court also cited *Scott vs. Longwell* (Mich.) 102 N.W. 230, a case involving damages caused by water seeping through the bottom of a mill race. The leakage occurred, on each occasion, after the race was cleaned and the bottom scraped. We read: (231 N.W. cit.)

“In view of the undisputed fact, that such a race was likely to leak on account of the scraping and cracks, I think that we could safely say as a matter of law that defendants were negligent in not taking proper precaution to prevent the water escaping.”

Continuing the Wyoming Court said: (791)

“But if it be true that the ditch was constructed in such a place and manner or through such soil that it was impossible to prevent the continuous and large amount of seepage that occurred, or at least to avoid the injurious consequences thereof, then it might be difficult to find any reasonable basis for holding that the defendant

had exercised the required diligence, care and skill in constructing its canal.”

In the present case, defendant’s experts (skilled engineers) gave it as their opinion that the unstable condition which they found and which caused the break was caused by water seeping through the bottom of the canal and accumulating in the foundation until it caused the canal bank to fail.

These cases, and others cited, *supra*, indicate what is good construction and maintenance and what is not, and regardless of what type of damage results, either seepage or deterioration to the point of failure and resulting water shortage it constitutes an omission of duty for which defendant is liable.

While our claim of damages is based on defendant’s failure to deliver water, and not on account of seepage from the canal, these authorities are pertinent in proving that defendant’s failure grew out of its lack of due care in maintaining and inspecting its facilities.

We feel that this line of authorities is ample to sustain the principle that it is negligence to construct a canal over loose pervious strata without taking any precaution to avoid danger of leaks.

**THE COURT ERRED IN NOT GIVING CLAIM-
ANTS THE BENEFIT OF THE RULE OF
RES IPSA LOQUITUR**

As a premise of finding that the plaintiff had not

established any negligence on the part of the defendant the court said in his opinion (TR. 65) "In view of the nature of the duty to deliver water, *res ipsa loquitur* does not apply."

It is conceded, and has been affirmatively found, that the defendant had always been, and was on July 14th, 1946, in the exclusive management, operation and control, including inspection, of the North Canal. (Finding No. 9, TR. 94)

It is also established that the break in the canal was such, that in the ordinary course of things does not happen if the one having such exclusive control uses proper care.

Mr. Gordon, defendants engineer who had charge of the repair of the break was interrogated by the court. (TR. 678)

"The Court: Well, you knew it was not a natural thing for a canal to break?

A. No, we were concerned about it.

The Court: And you didn't know what the reason was?

A. No, sir.

* * *

Q. It was unnatural and improper and unexpected for this canal to go out?

A. That is right, yes, sir." (TR. 681)

This furnishes a basis for the application of the

res ipsa loquitur rule and in determining the weight of claimants evidence they should have been given the benefit thereof.

In a recent decision of the Supreme Court of the United States, *Jesionowski vs. Boston & M. R.* 329 U. S. 452, 91 L.E. 416, 169 A.L.R. 947, the court took a working definition of the rule of *res ipsa loquitur* from the earlier case of *San Juan Light & Transit Company vs. Fequena* 224 U.S. 89, 56 L.E. 680, in the following language: (169 A.L.R. 951)

“When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant’s want of care.”

Ramsell vs. Ring, 173 Fed. (2) 41 (8th Cir.) took the rule as adopted in the *San Juan Light Co.* case supra, and quotes from *Lachman vs. Pennsylvania Greyhound Lines*, 160 Fed. (2) 496 to the effect: (Page 43, 173 Fed. (2))

“The rule of *res ipsa loquitur* * * * does * * * relate to the general obligation, imposed on every plaintiff, to establish all the facts necessary to make out his cause of action * * * We must look to the law of the state in order to determine whether the doctrine of *res ipsa loquitur* should be applied.” (Citing *Sieracinski vs. Dupont Co.*, 118 Fed. (2) 531).

"We must look thus to the law of Missouri to determine whether the rule applies in this case."

Therefore, we apply the law of Oregon to determine whether this is a *res ipsa* case.

In *Esberg Cigar Co. vs. Portland* 34 Oregon 282, 55 Pac. 967, a case involving flooding plaintiff's cellar and damaging a stock of goods, it was shown that no ordinary pressure was placed on the pipe at the time it broke. Judge Robert S. Bean wrote the opinion and while not referring to the *res ipsa* rule by name said: (p. 967 Pac. Cit)

"As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care."

Other Oregon cases following and sustaining the Esberg case, *supra*, are *Chaperton vs. Portland Gen. Electric Co.* 41 Oregon 39, 67 Pac. 298, *Boyd vs. Portland Electric Co.* 41 Oregon 336, 68 Pac. 810, and *Coblentz vs. Jaloff* 115 Oregon 656, 239 Pac. 825, in which the court said: (827 Pac. Cit)

"It is true that because the doctrine of *res ipsa loquitur* is involved the burden of proof is not shifted to the defendant; but, when plaintiff has made out a *prima facie* case a presumption of negligence arises and it becomes incumbent on the defendant to proceed and overcome such presumption by showing that he exercised the degree of care required by law."

Later Oregon cases which are discussed *supra* hold that instead of a presumption, the doctrine creates only an inference.

Next was the comparatively recent case of *Suko vs. Northwestern Ice and Cold Storage Co.* 166 Oregon 557, 113 Pac. (2) 209 involving the collapse of a large water storage tank on top of a large building with a resulting injury and property damage to the plaintiff. In affirming a judgment for the plaintiff the court said: (213 Pac. Cit.)

"In the instant case the plaintiff did nothing to cause the bursting of the tank. In the ordinary course of matters the mishap would not have occurred except through carelessness in the construction, inspection or use of the tank. And, as hereinabove stated, the premises on which the tank was located were in the exclusive possession and under the direct control of the doctrine of *res ipsa loquitur*, so far as *res ipsa loquitur* applies." (Citing Authorities)
 "The fact that the plaintiff in his complaint charged the defendant with specific acts of negligence does not deprive him of the benefit of the doctrine of *res ipsa loquitur*, so far as concerns the acts alleged." (Citing Authorities)
 "The plaintiff was not required to give direct evidence of negligence on the part of the de-

fendant, inasmuch as proof of the manner in which the accident occurred was in itself, under the rule of *res ipsa loquitur*, a prima facie showing of negligence."

The court continued: (214)

"When the plaintiff proved the collapse of the tank and the injuries suffered by him as a result thereof he made out a prima facie case of negligence on the part of the defendant."

The latest expression of the Oregon Supreme Court, interpreting and applying the rule, is found in the Oregon Advance Sheets Vol. 51, 215 (Nov. 28, 1950) in *Gow vs. Multnomah Hotel Inc.* which analyses the earlier cases and clarifies the effect of the rule, as establishing an inference, rather than a presumption of negligence, saying: (220 Adv. Shts. cit)

"In any event * * * this court is committed to the proposition that *res ipsa loquitur* simply specifies certain facts or circumstances which, when found in combination, raise an inference of negligence."

The Court then quoted from *Dunning vs. Northwestern Electric Co.* 186 Oregon 379, 199 Pac. (2) 648, 206 Pac. (2) 1177, to the effect: (1190)

" * * * That rule (*res ipsa loquitur*) is merely a process of common sense reasoning. It assists in drawing logical inferences from circumstantial evidence which has been presented in negligence cases. * * * There is nothing artificial about the rule. It favors neither party with

any make-weights—as, for instance, presumptions—that were coined in the mints of law-makers. It gives to circumstantial evidence in negligence cases its real value, nothing more and nothing less. * * * ,”

The Supreme Court of Washington applied the rule in a ditch break case in *Dalton vs. Selah Water Users Asso.* (Wash.) 122 Pac. 4 and because the facts are almost identical with those at bar, we quote the pertinent language used. (p. 5 Pac. cit.)

“The appellant seeks to exculpate itself from the charge of negligence by testimony that the lining was properly installed, that the canal was patrolled daily, and that the patrolmen did not discover any indication of infirmity in the bank where the break occurred. This does not exonerate the appellant from liability. The evidence is that the water could pass through the space between the horizontal boards. If the witness Baird observed and foretold the danger, the patrolmen could have seen it had they given it a reasonable inspection.

* * *

“We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character.”

The rule of *res ipsa loquitur* offers assistance to the plaintiffs, who, because of the nature of these cases, are unable to ascertain facts which are known only to the defendant, and material to recovery.

In those jurisdictions where the doctrine of *Fletcher vs. Rylands* applies there is small need of applying the *res ipsa* rule. However, in many of

those jurisdictions where the rule of absolute insurer is rejected, the courts have followed a middle ground and put the burden of proving due care on the defendant by invoking the doctrine of *res ipsa loquitur*.

Thus in *City Water Power Co. vs. Fergus Falls*, 113 Minn. 33, 128 N.W. 817, Ann. Cas. 1912 A. 108, the case involved the failure of a dam and would have been governed by *Fletcher vs. Rylands* in any jurisdiction following that doctrine. After rejecting the rule of the *Fletcher* case, the court said: (110 Ann. Cas. cit.)

“This brings us to the question whether the maxim *res ipsa loquitur* applies to the facts alleged in the complaint. We are of the opinion that it does. The dam, its construction, and its maintenance were within the exclusive possession and control of the defendant or its agents. Dams constructed and maintained with the care required by law do not in the ordinary course of things break by the pressure of the water held back by them. The very purpose of constructing them is to impound the water of the stream. (Citing Authorities) The maxim, however, is a rule of evidence, not of pleading, and ultimate facts, not evidentiary ones, should be pleaded. On the other hand, it is true that proof of the fact alleged in the complaint in this case would establish a *prima facie* case in favor of the plaintiff, for the inference of facts from the facts pleaded would be that the defendant failed to use due care in the premises, hence it was negligent. It would be, from the very nature of this case, a great hardship, if not an impossibility, for the plaintiff to affirmatively allege and prove the particular negligence in

the construction and maintenance of the dam; but, on the other hand, the defendant knows presumably just how it was constructed and maintained. In any event, a general allegation of negligence in such respects would be sufficient."

If then, claimants had established a *prima facie* case, and that, in turn, created an inference of lack of due care on the part of the defendant then such inference is evidence.

There is no difference in the application of the rule in cases of damages resulting from breach of contract where the breach grew out of the negligent management of the instrumentality employed in performance, and in cases of pure tort resulting in personal injury. In one case the plaintiff is damaged in his property and in the other he suffers personal injury.

In either instance the plaintiff is endeavoring to establish liability for his damages. If his damages grew out of failure to perform a contract, because of a defective instrumentality, the *res ipsa* rule should be applied in the same manner and with the same results as though the plaintiff sought damages for a personal injury growing out of the same causation.

The rule is universally applied against carriers for injuries growing out of a contract of transportation. 16 Am. Jur. 366, Section 1623 et seq.

In *Danville Community Hospital vs. Thompson* 186

Virginia 746, 43 S.E. (2) 882, 173 A.L.R. 525, we read: (532 A.L.R. cit)

“There is no good reason why the application of the rule should be limited to cases involving a particular activity. It should apply wherever the essential reasons for its being exists.”

In *Esberg Cigar Co. vs. City of Portland* 24 Oregon 282, 55 Pac. 967, the rule was applied in an action for damages because of a broken water main.

Under the Oregon statute, Section 2-401 O. C. L. A. inferences and presumptions are indirect evidence. Indirect evidence is of two kinds: (1) Inference and (2) Presumption, and Section 2-402 O.C.L.A. provides:

“An inference is a deduction which the reason of the jury makes from the facts proved without an express direction of law to that effect.”

The inference of defendants negligence is supplied in these cases by the doctrine of *res ipsa loquitur*, and the prima facie case otherwise made.

We submit that such inference, supported as it is by the facts and circumstances disclosed in the record, is strong enough to call on the defendant for an explanation.

The authorities all agree that the doctrine of *res ipsa loquitur* creates a defensive burden on the defendant.

In *San Juan Light & T. Co. vs. Fequena*, 224 U.

S. 89, 56 L.E. 680, Mr. Justice Van Devanter, in determining the effect of the doctrine of *res ipsa loquitur* in analysing an inference wrote: (684 L.E. cit)

“When so read it rightly declared and applied the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant’s want of care.”

Having failed to recognise the doctrine of *res ipsa loquitur* and placing the entire burden of proof on the plaintiffs, the court apparently did not consider it necessary for the defendant to meet the effect of the inference.

The authorities all agree that there is a defensive burden to be met; some cases hold to a slight degree. *Black vs. Brown* (Miss) 29 So. (2) 665, 173 A.L.R. 874 says, at page 879:

“The extent of this defensive burden is at most merely to adjust the scales to equipoise but not to preponderance.”

Throughout the case the defendant as its chief defense endeavored to establish that the failure and collapse of the canal resulted from hidden and undiscoverable fault. Not only did the court fail to

make a finding in defendant's favor on this contention but rejected it. (TR. 64-65)

It is error to require a plaintiff to prove particular negligence causing his injury, unaided by the evidentiary inference in a case where the *res ipsa* doctrine is applicable. *Lowery v. Hocking Valley Ry. Co.* 60 Fed. (2) 78, followed with approval in 127 Fed. (2) at 608.

In *Sweeney vs. Erving* 228 U.S. 223, 57 L.E. 815, the court in an opinion by Mr. Justice Pitney held: (819 L.E. cit)

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

Lowery vs. Hocking Valley Ry. Co. 60 Fed. (2) 78, (6th Circuit), held: (P. 79)

"It has also frequently been said that the effect of the doctrine of *res ipsa loquitur* is merely to shift to defendant the burden of going forward with evidence, at the risk of suffering an ad-

verse verdict based upon an evidential inference or procedural presumption of negligence. But in the present case we think that the plaintiff was entitled to the charge that, in determining the existence or nonexistence of negligence, it would be permissible, although not obligatory, under the facts of the case at bar, to draw an inference of such negligence from the mere happening of the accident. While this inference or procedural presumption is rebuttable, the only evidence which will tend to rebut it is evidence of the degree of care actually used in the construction, inspection, and maintenance of roadbed and equipment. The 'explanation' referred to in decisions applying the doctrine of *res ipsa loquitur* is not an explanation merely of how the accident actually happened, unless such explanation also operates, or tends, to show the exercise of due care."

* * *

"We agree that it is not obligatory upon the jury to draw this inference of negligence, even in absence of explanation, but we think that it is equally clear that, where the facts of a case warrant an application of the doctrine of *res ipsa loquitur*, the jury should be advised that such inference is permissible. Otherwise expressed, we think that it is misleading, in such a case, to charge that the plaintiff must prove a particular negligence causing his injury, unaided by the evidential inference above referred to."

DEGREE OF PROOF NECESSARY TO OVERCOME INFERENCE

In *Hinds vs. Wheadon* (Calif.) 154 Pac. (2) 720, after defining the doctrine of *res ipsa loquitur* as

adopted in California, which recognizes the necessity of an explanation by defendants the court said: (p. 724)

“The explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference. It is for the jury to say whether the inference has been successfully met. (Citing cases) Although if the defendant fails to produce substantial evidence of the use of due care, as where it appears that precautions that should have been taken were not taken, the defense will be held insufficient as a matter of law. (Citing cases) All that he need do in any case is to produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of plaintiff.”

Ales vs. Ryan 8 Calif. (2d) 82; 64 Pac. (2) 409 (421), holds:

“The burden is not upon the plaintiff to show by evidence that the thing does not ordinarily happen if proper care is used by the surgeon, but an inference of negligence arises from the act itself which relieves the plaintiff of the onus of offering evidence as to a lack of care on the part of the defendant. The inference stands in stead of evidence.”

The *Ales* case, *supra*, was followed in *Durzanich vs. Criley* (Calif.) 122 Pac. (2) 53, holding; (p. 56)

“However, the trier of the fact cannot arbitrarily disregard the inference.”

and finishes by saying that the inference was not refuted by the evidence offered by defendant and

ordering judgment on the strength of the inference:

“Such failure necessitates a finding of negligence in accordance with the inference.”

**DEFENDANT'S TESTIMONY DID NOT REBUT
THE INFERENCE OF NEGLIGENCE
CREATED BY THE FACTS OR
BY THE DOCTRINE OF
RES IPSA LOQUITUR.**

Instead of contradicting the inference of negligence that was in the case, the testimony offered by the defendant corroborated and strengthened the proof of negligence, particularly in the following respects:

(1) Defendant's witnesses testified that the base of the canal had been reduced to a state of instability because of water percolating down through the sides and bottom of the canal. (Newell, TR. 511-2 App. 113-14, Gordon TR. 658 App. 126 and Carter TR. 571, App. 111-12.)

(2) Defendant's witness Boden (TR. 542) testified to the specification of a core wall and the use of but three cubic yards of dirt over a space much smaller than the specifications called for.

(3) Defendant's testimony of inspection showed the neglect of any adequate inspection and inspection by persons not qualified adequately to inspect the canal.

(4) Defendant's testimony shows a total lack of any inspection of the area of the second break.

(5) Defendant's testimony shows the discharge of an excessive amount of water into the canal after the first repair when the canal was yet in an unfinished and weakened condition thus precipitating the second break.

(6) Defendant's testimony showed the construction of the canal over a porous terrain in an unlined canal incapable of holding water.

There was no evidence adduced by defendant showing due care, either in construction, maintenance or inspection. In fact there was no affirmative evidence offered at all by the defendant, which tended to show due care in any respect. All that defendant has to rely on is the legal presumption against negligence.

In *65 C.J.S. 1074*, Section 243, we read:

"Plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself, and, having done this, he is entitled to recover unless defendant produces sufficient evidence to rebut the presumption. * * *"

Continuing we read:

"The only evidence which will tend to rebut an inference or presumption of negligence is evidence of the degree of care actually used. Where plaintiff introduces evidence sufficient to make out a prima facie case of negligence, it is incumbent on defendant to rebut such showing, as considered supra (Sec. 208) by producing op-

posing evidence of at least equal weight. On the other hand, evidence which is sufficient to rebut a presumption of negligence may be overcome by proof of physical facts and circumstances showing it to be incredible.”

A closer analysis of this statement indicates that the evidence offered to meet the inference must show defendant to be free from negligence as shown by authorities cited *infra*.

No inference of due care can be logically drawn from the defendant's evidence in this case. Every particle of defendant's evidence augments the presence of negligence.

In weighing the evidence, plaintiff is entitled to the effect of defendant's evidence.

In the same text above quoted we read: (65 C.J.S. 1074)

“Plaintiff is entitled to the benefit of any evidence introduced by defendant to show the negligence of the defendant.”

Therefore, we are entitled to the benefit of all the testimony of defendant's witnesses showing that the canal was built over a porous terrain, that it was unlined, that water seeped through the canal bed and sides to the extent that it created a condition that would not sustain the weight of the canal as well as to the effect of defendant's testimony showing a total lack of any adequate inspection of the structure.

We are entitled to the benefit of the testimony given by defendant's witness Boden regarding the lack of constructing a core wall in the canal bank. (Tr. 542)

All that was offered to show the manner of construction was the specifications, prepared before construction work began, with no word of what was actually done in complying with the specifications.

In *Lowery vs. Hocking Valley Ry. Co.* (6th C. C. A.) 60 Fed. (2nd) 78 we read: (79)

"While this inference or procedural presumption is rebuttable, the only evidence which will tend to rebut it is evidence of the degree of care actually used in the construction, inspection and maintenance of roadbed and equipment * * * ."

In 65 C.J.S. 1023, Section 220 we read:

"Defendant's explanation must be as broad as the inference arising from the operation of the doctrine, it must be a reasonable one, with as much probative force as the inference itself."

Here, defendant's evidence, instead of rebutting the weight of the inference, actually supported plaintiffs charge of negligence.

In *Dierman vs. Providence Hospital* (Calif.) 179 Pac. (2) 603, the Court of Appeals affirmed a judgment for the defendant holding that the defendant's testimony offered a sufficient basis for the jury to find for defendant.

However, the Supreme Court (188 Pac. (2) 12)

reversed on the ground that the defendants testimony did not rebut the inference created by the *res ipsa* doctrine, saying: (14)

“The showing here goes farther than the establishment of a mere *prima facie* case under the doctrine of *res-ipsa loquitur*. Not only is there a *prima facie* showing that the accident is one which in the ordinary course of events would not have happened if defendants had used due care but the defendants themselves have established the ‘possibility’ or ‘probability’ that they used an impure and, under the circumstances, dangerous anesthetizing agent. That agent, the nitrous oxide, was at all times concerned in the exclusive possession and control of defendants.”

and quoted (15) from an earlier California case *Bourguignon vs. Peninsular Ry. Co.* 181 Pac. 669, to the effect:

“That, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense

that it covers all causes which due care on the part of the defendant might have prevented.' ”

The court then pointed out defendant failed to rebut the inference, particularly, that their acts were not free from an implication of negligence.

“Such a definite cause is not shown to possess ‘no element of negligence’ on their part although evidence material to this issue was available to them.”

In *Shearman and Redfield on Negligence* (Rev. Ed.) Vol. 1 P. 154, Section 56, we read:

“Rebuttal of the presumption of negligence raised under the rule of *res ipsa loquitur* has been said to throw upon the defendant the burden of presenting an explanation of the accident which is consistent with freedom from negligence. The term ‘explanation’ as used in the cases properly connotes reconciliation of the event with the absence of negligence on the part of the defendant.”

The editors cite *Carroll vs. Boston Elevated Ry. Co.* (Mass.) 86 N.E. 793, where we read: (797-798 N.E. Cit)

“The defendant, in the explanation which it offered, was not called upon to account satisfactorily for the accident, although often times when that has been done the presumption of the carrier’s negligence disappears, but only to show or explain that it has not been guilty of negligence.”

As we have said elsewhere, the only evidence

adduced by the defendant as to the cause of the break in the canal is to the effect that the water seeped through the canal bed and walls, thus causing such instability that the structure failed. Thus the explanation did not free defendant from negligence, but on the contrary supported the inference and fastened negligence on the defendant.

PLAINTIFFS PROVED NEGLIGENCE WITHOUT THE AID OF RES IPSA LOQUITUR

Waiving, for the purpose of the following argument, the benefit of the *res ipsa loquitur* rule we insist that the decision relating to defendant's negligence is contrary to the decided weight of the testimony and therefore clearly erroneous.

The complaint sets out the following allegations of negligence (TR. 8, 9, 10) which we epitomize:

(A) That the canal was constructed over a porous structure which permitted seeps through the sides and bottom of the canal.

(B) That after repairing the first break an excessive head of water was turned into the canal before it was fully repaired, which resulted in causing the second break.

There is no serious dispute in the testimony regarding the character of the soil through which the canal was constructed. At least it is fully established by plaintiffs witnesses whose testimony is uncontradicted.

A. C. Merritt, plaintiffs witness, testified (TR. 297-301) that he had engaged in various types of engineering and geological work in the territory since the early 1900's; that he had extended experience in designing and building irrigation projects (TR. 337, 338); that he examined the area where the break occurred in March prior to the trial (Tr. 292) and when there was no water in the canal (TR. 295); and that he made a number of photographs (TR. 297). In answer to a hypothetical question (TR. 340-343) he testified that the break in the canal was the result of its being constructed over a stratum which absorbed water to the point of saturation and would not support the bank. (TR. 343, App. 109)

James W. Bouten, plaintiffs witness, also an irrigation engineer from 1908 on engaged in various phases of irrigation engineering and construction in Southern Idaho (TR. 409-412), testified that he accompanied Mr. Merritt in the examination of the North Canal. He was asked the same hypothetical question propounded to Mr. Merritt (TR. 424-425) and gave, as his opinion, that the saturation of the bank below, through the pervious material, caused the bank to give way, and that there was nothing there to stabilize it. (TR. 426, App. 109)

This witness further testified (TR. 414, App. 109) that the area shown in plaintiffs Exhibit 73 where Mr. Bronken stood holding a surveyor's rod showed "a very porous formation" and that the porous

structure extends about 200 feet up and down the canal. (TR. 415)

Paul Bronken, plaintiffs witness, and also an engineer and geologist, testified that he prepared Exhibit 80 (TR. 116) in which witness attempted to show the sandy, pervious formations and blocky open formations observed in the bank, and also at the top of the wash below the toe of the canal. (TR. 116)

On cross-examination he testified to the type of investigation made to ascertain the porous area. (TR. 120) On re-direct examination he testified that Exhibits 80 and 81 show the outcropping of the porous areas. (TR. 121, App. 110)

There is complete agreement as to the designation of the geological formation. Mr. Merritt designated it as what is generally known as the Idaho formation. TR. 348) Mr. Gordon, an engineer and geologist called by the defendant, testified that the formation was called the Payette formation "which the geologist call the Idaho Formation." (TR. 631)

Mr. Spofford, defendant's witness, testified it was called the Payette formation or Idaho formation. (TR. 702, App. 111) Mr. Newell, defendant's witness testified that the area was part of the Payette formation. (TR. 511) Mr. Boden, also defendant's witness, referred to the area as Payette formation. (TR. 523)

Thus the record discloses complete agreement on the type of formation over which the defendant constructed the North Canal.

Neither is there dispute about the effect of transporting water through a canal built over this particular structure. In addition to the testimony of plaintiffs witnesses Merritt and Bouton as to the cause of the break, we have the testimony of defendant's engineer, Mr. Carter, that the break occurred because of the character of the formation upon which the canal was built. (TR. 570-571, App. 111-12)

Mr. R. J. Newell, defendant's witness, an engineer of high standing and occupying a responsible position with the Bureau of Reclamation, testified similarly to the cause of the break. (TR. 511, App. 113-14)

Mr. Grant Gordon, defendant's witness and engineer in charge of repairs on both breaks testified to a similar state of facts. (TR. 618, App. 112-13, TR. 668, App. 113)

Concerning the conditions of the canal, the trial court observed in its opinion: (TR. 65)

"It was unquestionably proved that there were structures near the canal at the points which were pervious to water, and these were saturated at the time of the break."

And at TR. 70 of the opinion we read:

"It is shown how the flow was carried by said structures inept for such burden in this particular place."

PLAINTIFFS HAVE DEMONSTRATED NEGLIGENCE IN THE CAUSE OF THE SECOND BREAK IN THE CANAL

It will be remembered that in the late afternoon of July 18th, the first break was repaired to a degree where defendant's engineers decided to resume operating the canal. An excessive amount of water was released into the canal and about 12:30 A.M. on the 19th, a second break occurred immediately down stream from the first break, so close that when repaired, it resulted in a complete new bank extending the full length of both breaks.

Defendant's witness gave it as his opinion that the first break was caused by water seeping through the bottom of the canal and saturating the base to the point of complete instability and that the second break resulted from the same cause. (Gordon TR. 618, App. 112-13)

When the first break was being repaired no inspection was made to determine the condition of the canal at the point where it broke the second time although the areas were continuous. (Gordon TR. 677, App. 134-5) (Carter TR. 578, App. 136) and although an inspection would have disclosed the dangerous condition which existed. (Gordon TR. 680, App. 122)

The first break released the full stream then in the canal and the water, from both directions, drained out. This eroded the bed and base of the

canal down a distance of eight to ten feet at the point of the break and the erosion feathered out, up and down the canal for a distance of 350 feet from that depth to the normal elevation of the canal bed. (Gordon TR. 643-645, App. 124-6)

The first break was repaired by building a core wall of selected earth material in the center of the new bank and building the bank up to close to normal height before any water was turned down for passage through the canal. However, the bottom of the canal had not been restored to the normal elevation and was several feet below normal before this water was turned down. (Gordon TR. 645, App. 126)

This condition of the bed of the canal extended 350 feet above the break and 150 feet below the break and across the point where the second break occurred. (Gordon TR. 644-647, App. 125)

With the repair in that condition Mr. Spofford directed that water be released from above for passage through the canal. (Spofford TR. 703-704)

In releasing the water the defendant's employees closed all discharge gates from the canal, removed all the check dams and opened all the gates and structures in the canal so that the full capacity of the canal at a point above the break known as Lockett Spillway, where the canal had a capacity of 750 second feet (Newell Tr. 480), came down and hit the canal at the point of the break in its yet

incomplete state of repair. (Percey, TR. 214-220, 222-223, App. 115-20)

This caused the banks at the point of the break to overflow. (Hawkins TR. 150-151, App. 120-22) (Gordon, TR. 647, App. 132) During this overflow the bank of the canal was raised. (Terhune TR. 253, 257, 258, 259, App. 128-29)

About the time the water ceased to overflow the canal bank (1:30 A.M.) the second break occurred immediately downstream from the repair (Gordon TR. 610-13) with about the same resulting discharge of water as occurred during the first break.

THERE WAS NEGLIGENCE CAUSING THE SECOND BREAK IN THE FOLLOWING PARTICULARS

Knowing the saturated and weakened condition of the canal at this point defendant made no inspection in the immediate adjacent section of the canal to determine its condition. (Gordon TR. 677-678, App. 134-5)

The condition of the canal at that point was critical. (Gordon TR. 658, 659, 660, App. 129-30)

It was negligence to turn an excessive amount into the canal in its weakened condition.

The canal bed at this point of the second break was eroded far below its normal elevation when

this amount of water was turned in. (Gordon TR. 616, 646, 647, App. 130-2) (Terhune TR. 245-246, App. 132-3)

Regardless of knowledge of the conditions of the canal at the point of the second break, it was gross negligence to turn down the amount of water shown by this record into a canal with a capacity of only 450 second feet where the bottom was eroded away as shown by the testimony of Mr. Gordon.

Mr. Newell gave it as his opinion that the second break occurred because first repair was not extended far enough downstream. (Newell Tr. 497, App. 133-4)

FAILURE TO BUILD A CORE WALL IN THE OUTER BANK IS NEGLIGENT CONSTRUCTION

A core wall, or core bank, is a structure of impervious especially selected material built to a height of above the normal water line of the canal in order to prevent seepage through the bank. After the core wall is in place, the bank is then built up around and over the core wall to specifications from the materials excavated from the canal bed.

Mr. Bouton testified that good engineering would require the construction of a core wall in the outer bank of the canal at the point of the break. (Bouton TA. 419, 420, App. 157-8)

The plans and specifications required a core wall at the point of the break. (Newell TR. 467-468, App. 158-9) Speaking entirely from specifications and field notes which he read, Mr. Boden, defendant's construction engineer, testified that the specifications required a core wall for 600 feet beyond the point at which the canal broke. (Boden TR. 530, App. 159-60)

The specifications required a core wall for the entire area over which breaks occurred. (Boden TR. 531-32, App. 159-60)

It would appear that specifications called for a core wall extending for several hundred feet or as Mr. Boden said: (TR. 532)

"Oh, yes, some distance each side, continuous."

However, on cross-examination Mr. Boden limited the space over which he assumed it was actually built to an area 50 feet long over a base 3.6 feet wide at one place and 3.8 feet at another.

However, reading from the specifications, he testified: (TR. 525)

"It also shows, by means of a dotted line here the position of a core bank wherever needed, and the specifications provide that where that is built it shall have a height, minimum height, of a foot above the designated water depth, and a minimum top width of 8 feet."

Assuming that the core wall was built as Mr. Boden read from the field notes 50 feet long by 3.8

feet wide and with a content of 3 cubic yards, it would be ineffective for the purpose of preventing seepage, because it couldn't possibly create an impervious wall above the water level.

Clearly, if built at all, it did not conform to specifications or the needs of the structure.

The purpose of the core wall was to provide an impervious bank that would prevent water soaking through. (Boden TR. 542, App. 161)

The witness had no personal knowledge that this core wall was in fact constructed (Boden TR. 539), and the notes were made before construction. (TR. 539, App. 160) The notes called for three cubic yards of earth in the core wall designed. The dimensions of the area covered by this three yards of earth was 50 feet by 3.8 and 3.6 feet. (Boden TR. 542)

THERE WAS NO CORE WALL IN THE CANAL BANK AT THE POINT OF THE BREAK

The only evidence of whether or not a core wall had ever actually been constructed came from plaintiff's witness, Terhune, who testified that there was no appearance of a core wall in the bank after the break. (Terhune TR. 238, App. 126-7) (TR. 277, App. 127)

We consider this evidence as conclusive, as defendant's engineers were present during the repair

and were witnesses at the trial and did not contradict this testimony.

The desirability of the core wall is evidenced by the fact it was required by the specifications and the further fact that its presence would have prevented the break. Mr. Bouton testified that the break could have been avoided by either putting in the same type of core wall the defendant's employees finally used, or by lining the canal. (Bouton TR. 427 (App. 161) This testimony and opinion was not challenged by defendant's witnesses. It is corroborated by the fact that since the repair the canal is dry with no evidence of seep. (Gordon TR. 639)

In fact Mr. Newell testified that a core wall similar to the one placed in the bank at the time it was repaired would have prevented any seepage through the bank and there would have been no seepage from the start. (Newell TR. 496-497)

THERE WAS NO ADEQUATE INSPECTION OF THE CANAL

The duty of inspection was not performed by competent engineers but was delegated to the ditch riders.

Mr. Spofford who was in charge of the North Canal testified: (TR. 689-690)

“Q. And what are his instructions if he encounters anything which might appear to endanger the canal?

A. His instructions are to always watch for leaks and seeps and to report any of those seeps or leaks that he has seen himself or that have been reported to him by any of the farmers.”

Thus we see that the ditch riders employed are not engineers but farmers, and that they are only required to report seeps and leaks that they see, after the leak occurs.

Other than such inspection as these farmer-ditch riders made in driving their automobiles over the tortuous curves on top of the ditch bank the only other inspection consisted of Mr. Spofford's walking in the bed of the canal once in the fall of 1944 and 1945. (TR. 713, 714, 715, 716, App. 138-41)

We maintain that such inspection is wholly insufficient to insure the safety of such a structure as the North Canal.

Here is a structure 36 miles long, down to the point of the break, carrying 1100 second feet of water at the head, and 450 second feet at the point of the break. At the point of the break it was confessedly built over a porous formation that permitted water to seep through the bottom to an extent that converted the foundation into a “loblolly” of mud with no stability whatever.

The defendant depended, for the safety of the

canal, on the observations of farmer-ditch riders, selected not on their ability or training to evaluate the type of soil formation over which the canal was built or the hydrostatic pressure of this amount of water, or any of the other elements a trained engineer would be supposed to know, but rather because "that they are farmers and understand farming" and are "acquainted with the area."

The trial judge commented on this matter of inspection (TR. 68) holding that it was sufficient. This was serious error.

But in holding the defendant liable in the two cases involving flood damage the Court held that there had been no adequate inspection. (Tr. 87)

We take the liberty of quoting a portion of the Court's language at this point.

"The defendant, knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

The sufficiency of the inspection was just as important to the farmers who suffered from water shortage as it was in finding the defendant liable for flooding their neighbors land.

Detailed "engineering inspection" cannot result from the casual observation of farmer-ditch riders

as they ride along a ditch bank in an automobile in the performance of their other multitude of duties.

In the first place defendant's ditch was carrying 450 second feet of water at the point of the break.

"Water, like fire, when unrestrained, is one of the dangerous elements known to man."

"And in the construction of these works we should remember that at all times we are dealing with a most dangerous element, and one which ever is seeking to escape."

(Kinney on Water Rights, Vol. 2, p. 1465, 1466, Sec. 836).

Water is constantly seeking its own level, and under pressure that tendency is increased. When it is transported in great volume through an unlined earthen canal on an elevated hillside there is a constant danger of escape. When the canal is built over porous structures, so open and pervious as to permit excessive seepage, the danger is magnified beyond calculation.

The trial court recognized the potential and ever present element of danger and on imposing liability in the two flooding cases said in his opinion: (TR. 86)

"Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof."

No one can rationally say that defendant's managers had no reason to anticipate a break.

The legal principles which control defendant's duty to adequately inspect are well established.

In Oregon we find a good expression of the rule in *Suko vs. Northwestern Ice and Cold Storage Co.*, 166 Oregon 557, 113 Pac. (2) 209. In this case a large water storage tank constructed on top of a building burst, injuring the plaintiff. The court held it to be a *res ipsa loquitur* case. We read: (567 Oregon Cit. 213 Pac. Cit)

"The defendant called as expert witnesses an engineer who had examined the tank immediately after it was built and who gave it as his opinion that the tank was properly constructed and capable of withstanding the pressure to which it was subjected, and another licensed and registered engineer who was employed by the Fire Adjustment Rating Bureau and had inspected the tank in question some nineteen times between 1927 and 1937. The main purpose of the latter engineer's inspection on all those occasions was to note the level of the water in the tank and to ascertain whether the tank was leaking or had any defects apparent to casual observation. He made no examination such as a structural engineer would make. In addition, some of the defendant's employees testified that they were on the roof of the defendant's building several times a week and would glance at the tank, to look for leaks, and at times would climb to the top of it to ascertain the water level. There appears not to have been made by the defendant, during all the time it was in possession of the property, any examination of the structural condition of the tank."

As said in the very recent case of *D'Anna v. U.S.* 181 Fed. (2) 335: (337)

"There was evidence that the plane was given routine inspections after each 30 hours of flying time; but the person who made the inspection next preceeding the flight over Baltimore had no recollection apart from his recollection of custom as to the inspection made; and not only was his inspection report not produced, but there was evidence that it had been destroyed as a matter of routine procedure, although the dropping of the tank had been an occurrence of sufficient consequence to call for a board of inquiry. Surely, the presumption of negligence raised by the statute is not met by vague and unsatisfactory evidence of this sort."

Then after discussing rules of liability, and the fact that a gasoline tank actually became detached and fell causing injury, the court continued:

" * * * for the falling in such case is the strongest sort of proof of either negligent operation or defective construction or equipment. Such proof is manifestly not overcome by evidence of routine inspections of the sort here produced, particularly where the reports of the inspection are not produced."

65 C.J.S. 597, Section 87 (b)

"The inspections must be sufficiently frequent to insure a reasonably safe condition, and thorough enough to determine the condition."

Among the cases cited as authority is *Feeney vs. New York Waist House*, 105 Conn. 647, 136 Atl.

554, 50 A.L.R. 1539, involving an injury to a pedestrian on a sidewalk by falling glass from a show window. The trial court found that there was no negligence and placed the cause on an excessively strong wind. Apparently the findings were detailed and positive. In reversing, the appellate court found that there was no evidence of adequate inspection. After finding proper installation, the appellate court said: (1541 A.L.R. Cit)

“There is no finding as to the condition of the window subsequent to its installation, except that the construction has not been changed during defendant’s possession, and that no defect or condition of disrepair ‘was brought to the attention of the defendant, its agents or servants.’ The defendant’s manager entered the space surrounded by the window on an average of twice a week to arrange merchandise for display and noticed no defect or disrepair, but nothing else resembling an inspection is disclosed by the finding. * * * The existence of some defect in the condition of the window at the time and other likely causative or contributing elements are not so negatived and excluded as to warrant the inference that the wind was the sole cause.”

* * *

“It was incumbent upon the defendant to give such inspection as is reasonably required in order to guard against the dangerous effects of deterioration from natural causes. (Citing authorities) Such inspection must be frequent and thorough enough to determine existing conditions. * * * It was therefore incumbent upon the defendant to show that the fall of the glass and resulting injury did not occur through negligence on its part. (Citing authority) It

was peculiarly within the power of the defendant to establish that the care required had been used in maintaining as well as in constructing the window, the facts found fall short of disclosing a sufficient compliance with this duty; on the contrary, they show that the defendant has not complied with its duty of inspection."

The defendant is bound, as a matter of law, to know of any defect in the facilities employed and if it fails in performance of its duty it cannot plead lack of knowledge of such defects.

In *65 C.J.S. 352*, Section 5 (b) we read:

"Knowledge of the defect or danger is not a necessary element of negligence where the act or omission, in and of itself, involves a violation of a duty as in the case of the violation of a statute or ordinance in a jurisdiction where this is regarded as negligence per se, or where there is an absolute duty on the owner or person in charge of property to keep it in a safe condition."

Among the authorities cited in support of this text is *Ohran vs. Yolo County* (Calif.) 104 Pac. (2) 700, a case involving a long-continued slippery place in a highway. It was claimed that the supervisor did not have notice of the condition, to which the court answered: (703)

"Where the condition is created by the party claimed to be liable no further notice is necessary."

An earlier California case *Sandstoe vs. Atchinson T. & S. F. Railroad Co.* 82 P. (2) 216 held (219)

"There is no merit in defendant City's contention that it had no notice of the dangerous condition. According to the allegations of the complaint the City created the condition for which plaintiff seeks to hold it liable. Under the decisions it was not necessary for plaintiff to allege further notice."

In *Sears Roebuck & Co. vs. Peterson* 76 Fed. (2) 243 (8th Cir) we read: (246)

"It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises. It is universally held that the owner of the premises is charged with notice of any structural defects in his property on the theory that one must be charged with notice of his own act, and hence, whenever defective conditions are due to the direct act of the defendant or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied." (Citing Authorities)

In *Mattson vs. Central Electric and Gas Co.* 174 Fed. (2) 215 (8th Cir) a case involving escaping gas, Judge Gardner discussing the duty to inspect wrote page 220:

"While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowledge, and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance."

DEFENDANT'S OFFICERS HAD ACTUAL NOTICE OF A DANGEROUS CONDITION IN THE CANAL SO CLOSE TO THE BREAK AS TO CHARGE THEM WITH KNOWLEDGE OF A SIMILAR CONDITION ANYWHERE IN THE CLOSE VICINITY.

As a matter of fact, not only the defendant's engineers, the project manager, and the ditch riders had actual knowledge of a constant seep only 300 feet north and down stream from the point of the break. The stream emanating from this seep was visible from the highway on top of the canal bank.

Spofford TR. 714 "Well, that is very noticeable from the canal bank."

These same officers had actual notice of the seep in the Hust field some short distance south and above the point of the break. (Spofford TR. 713) and Pettet Tr. 760, App. 142-3) Nothing has ever been done to repair these two seeps.

The engineers, at least, had actual knowledge of the porous terrain over which the canal was built between these points but so far as their testimony indicates no employees of defendant's ever looked for any other indication of weakness anywhere in the area and especially between these two very obvious seeps. True, Mr. Spofford walked in the bed of the canal once in the fall of 1944 and again in the fall of 1945 trying to find the source of the leak in the Hust field, but never walked over or

looked in a place where a seep would show up. Seeping water would escape downward, not upward, and would show on the outside and at the toe of the canal (where everyone else saw it) and not on the top of the bank where, of course, it was dry.

Mr. Newell, Mr. Carter and Mr. Spofford were all engineers in the employ of defendant, and, judging by their testimony as to qualifications, were competent to inspect the canal and yet, this all important duty of inspection of a hillside canal, carrying 450 second feet of water through a porous, unlined structure was delegated exclusively to a farmer-ditch rider who had a multitude of other time consuming duties. (Pettet Tr. 758)

“A. Well, I maintain ditches, help clean them, keep the weeds out and all of the obstructions out of the ditch, and keep the gates and weirs free, and then, of course, I keep the account of the water for the season for each water user.”

The Court was grievously in error when he suggested that this manner of inspection was adequate.

Similar inspection was held inadequate in *Suko vs. Northwestern Ice etc.* quoted supra, where the water was static in a wooden tank.

The Oregon rule, taken from *Price vs. Oregon etc. R. Co.* 47 Oregon 350, 83 Pac. 843, to the effect that:

“The true test, considering all the circumstances

is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provision therefore."

is employed by Professor Wiel in his text on Damage by Ditch Breaks. (*Wiel on Water Rights* Vol. I, P. 491)

The trial Court wrote in his opinion. (TR. 63)

"However, there is no doubt from the testimony which is now in the record that the defect could have been discovered had proper tests been taken at the time of construction or afterwards. Competent engineers, however, must admit that the mere fact that these structures, which would not hold water, were buried four to six feet beneath the canal and over a space of two hundred to three hundred feet along the central line could have discovered with proper tests at the time of construction."

The Court's thinking could have very well gone further, and placed the blame for the condition of the canal on the omission of a core wall, called for by the specifications. Such was the opinion of Mr. Newell, defendants witness, who is perhaps the most outstanding irrigation and general hydraulic engineer in the Northwest, who testified: (TR. 496-497)

"Q. Do you think that by putting in the core wall as Mr. Terhune testified was put in, you have cut off the seepage through the side of the canal?

A. I think so.

Q. That would lead to the other conclusion that if a core wall of the same type was put in to start with you would have, perhaps, not have any seepages through it?

A. I think that is correct."

This testimony, coming from the engineer who supervised the construction of the canal (TR. 456) should have satisfied the condition the Court had in mind when he wrote: (TR. 64)

"If the simple device of building a core would have prevented the disaster, this necessity seems too plain for argument."

The trial Court, in imposing liability on defendant in the two flooding cases, recognized that a high degree of danger called for a high degree of care and held that this degree of care had not been observed (TR. 87, App. 142) and further observed: (TR. 85)

"Since a high degree of danger calls for a very high degree of care, inspection by untrained persons was no defense but that the examination by a highly trained expert might be required."

The Court was speaking here of the same defect, inspected by the same employees, regarding the same structures, and the same failure, and the same evidence, upon which he had dismissed plaintiffs claim of damages for shortage of water.

We can't appreciate this distinction.

DEFENDANT WAS BOUND TO ANTICIPATE BREAKS

Here again the Court's finding (No. 14 Tr. 95) in which it is found that defendant need not anticipate breaks is contrary to the facts and to the laws of hydraulics as it pertains to irrigation canals.

There is always to be considered the fact that water, confined in artificial structures, is bound to seek its own level. That is why water runs downhill. The larger the body, the greater danger from the pressure.

Aside from the fact that defendant was conveying a large head of water over a dangerous terrain, in an unlined ditch, it had had the experience of two earlier breaks on the same canal. (Newell TR. 467, App. 143-4 Tr. 484, App. 144-5)

And there is always danger where the canal cross-cuts porous areas. (Newell TR. 485)

“Q. Now, do you recognize the fact that there might be danger in cross-cutting a porous stratum that would soak up water where there is no core wall that would cut that porous stratum off?”

A. Wherever specially pervious stratum was encountered it should have attention.”

There is another element of negligence on a crucial point, where the testimony of plaintiffs witnesses is uncontradicted. That refers to the seepage from the canal at the immediate point of the break,

and on what is known in the record as the Shaw Ranch, and the failure of defendant to discover it and make repair or make such an inspection of the canal as would reveal its dangerous condition.

The area affected by this excessive water is four and a half acres in extent and is delineated on plaintiffs Exhibit 82. (TR. 114-115).

This condition was very acute during 1945, the year before the break occurred, and again in 1946 prior to the break. Some five witnesses were called by the plaintiff who testified on this point.

Mr. Theodore Matherly was called by the plaintiffs and testified that he plowed the field immediately below the point of the break in March, the year before the break, and could not finish the plowing because the land was too soft. (Tr. 125-9, App. 146-8)

This condition existed before any water had been used for irrigation that year. (Tr. 132).

Mr. Arthur Hawkins was called by the plaintiffs, testified that he plowed that field in 1945 before any water had been used for irrigation and that it was wet, that his equipment would not work, (Tr. 138-142, App. 148-50)

In 1946 this witness observed an attempt to harvest the hay crop and testified that there was seepage there. (Tr. 144)

George Hust was called as a witness by the plaintiffs and testified that he assisted the owner of the ranch in irrigating this tract of land in 1945; that a small lateral ditch was used for that purpose; that the headgate to this ditch was closed but water was running in the ditch for part of its length. (Tr. 171, App. 150-1)

This lateral was closed to any flow from the canal, or any other ditch, (TR. 184), and was built very close to the toe of defendant's canal. (Carter TR. 579-80, App. 156-7)

“I would say in some places it was 5 feet and in other places it was maybe 20 feet away it didn't exactly follow the toe of the bank.”

John Turner was called as a witness by the plaintiffs and testified that he helped his uncle Ben Shaw who owned the land delineated on Exhibit 82, put up his hay and there were several spots where only horses could be used because machines mired down. (Tr. 187-9, App. 151-3)

Mr. Ben Shaw was called as a witness by the plaintiffs and testified that he owned the land known as the Shaw place and that there was an excessive amount of water in the land immediately below the point of the break. (TR. 201, App. 153-4)

None of the plaintiffs witnesses who testified on this point have filed any claims for damages and their testimony was not contradicted, although none

of the defendant's witnesses admit they had any knowledge of the conditions above described.

In addition to the conditions above described it is admitted that some 300 feet north of the wet area shown on Exhibit 82 there is another leak in the canal from which water runs the year around. (TR. 202.)

This particular seep was well known to the defendant's agents. (TR. 713.)

Then immediately south of the point of the break there is another seep that bubbles up and out of the ground also, (Tr. 176, 179) and there are three other seeps on the Hust Ranch. (TR. 178)

Mr. Spofford, defendant's irrigation manager, knew of this particular leak in 1944 and thereafter. (TR. 691)

The conditions revealed by the witnesses indicate the presence of danger to the stability and safety of the canal structure.

Mr. R. J. Newell, defendant's witness, and long a manager of defendant's projects in Oregon and Idaho testified that if these conditions existed as testified to by plaintiffs witnesses it indicated danger. (Tr. 491, App. 154) and again (TR. 487-488, 507 App. 154-5).

Mr. Carter, defendant's witness, and project engineer testified. (TR. 579-580, App. 156-7).

It is our contention that any reasonable inspec-

tion of the canal, or of the terrain over which it was built would have revealed this dangerous condition as early as 1945, a year before the break occurred.

The only inspection maintained or performed is indicated by the testimony of Mr. Spofford, defendant's manager who testified that in the fall of 1945 he looked for the source of seepage that occurred in the Hust field south of the point of the break by walking in the bed of the canal after the water was turned out that fall. (Tr. 713, 714, 715, 716).

Of course the danger of damages, incident to a lack of water for irrigation was perfectly apparent to defendant's agents. Some 18,000 acres of land were served by this canal below the point of the break. The break happened on July 14th, the height of the irrigation season. The entire agricultural economy of this large body of land was dependent on a constant flow of water through the canal. (Spofford TR. 700.)

Having a duty to plaintiffs and realizing the danger of damages resulting from failure of that duty a high degree of care was placed on defendant in the performance of its duty.

In Restatement (Torts, Section 284) we read:

“Negligent conduct may be either:

(a) An act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) A failure to do an act which is necessary

for the protection or assistance of another and which the actor is under a duty to do.

Comment on Clause (a) :

a. The actor, as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of an interest of another, if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character. The conditions under which the actor should realize the existence and extent of the risk involved in his conduct are stated in Sec. 289 and 290. The considerations which determine whether such a risk is unreasonable are stated in Sec. 291 to 293."

The court found: (Finding 12, TR. 95)

"It was the duty of the defendant to exercise reasonable care in the operation of the North Canal to enable it to deliver water to the plaintiff(s) for irrigation purposes."

There was no finding that the defendant had met that burden.

The court also found: (Finding 13, (TR. 95)

"It was the duty of the defendant to exercise reasonable care at all times herein involved in the construction, operation, maintenance and repair of the North Canal including proper inspection and for all purposes pertinent in these cases. The plaintiff(s) failed to prove by a preponderance of the evidence that the defendant failed to exercise that degree of care."

If there was any inference or presumption that

defendant was free of negligence such presumption was overcome by the fact that its structure failed.

The cases cited *supra* are authority for the principle that when plaintiff established the duty to furnish water, and the failure to perform, a *prima facie* case was made.

Assuming that the *res ipsa loquitur* rule applies (notwithstanding the court's opinion to the contrary) or that a *prima facie* case had been made, there is then brought into plaintiff's case an inference of defendant's negligence. This inference is evidence under the provision of Section 2-401 O. C. L. A., therefore, there is evidence of defendant's negligence before the court both as a result of *res ipsa loquitur*, and the effect of the *prima facie* case, which casts a burden on the defendant to rebut.

True, the inference is disputable and can be overcome by other evidence, as could a *prima facie* case, but there must be evidence which does overcome the probative force of such inference or *prima facie* case. To merely disregard the inference, or the *prima facie* case, in the absence of proof to the contrary, would be capricious and arbitrary.

To the above extent there is a burden on the defendant whether it had pleaded an affirmative defense or not.

The defendant also had the burden of proving an adequate defense of its duty to deliver water in accordance with its duty to the plaintiff.

This court, in *Union Pac. R. Co. vs. Stanger*, 132 Fed. (2) 982, dealt with the probative force of an inference of negligence created by the res ipsa rule and upheld the trial court in following such inference against a fair persuasive amount of testimony of due care, and held that an inference created by the res ipsa rule does not go out of the case when defendants evidence is received, saying: (984)

“We think this theory of res ipsa loquitur is premised faultily. The rule of res ipsa loquitur is not merely a rule of evidence shifting the burden of going forward with proof, for the inference of negligence under the rule does not disappear when met with substantial credible evidence of due care. It remains in the case throughout to be given consideration by the trier of fact in his weighing of the whole case with the burden of proof remaining with the plaintiff to the end.” (Citing *Sweeney vs. Erving* 228 U.S. 233, 57 L.E. 815)

and then held that a review of the testimony failed to show that the trial court abused its discretion.

In a later case, *Union Pac. vs. DeVaney*, 162 Fed. (2) 24 this court said: (25-26)

“Where the injury is the proximate result of a happening which would not ordinarily occur without negligence and the possession and control of the thing involved rests in a party certain, the lack of evidence as to negligence on the part of the injured person may be supplied by the doctrine of res ipsa loquitur, that is, the duty of going forward with proof in explanation of the happening moves to the party having the possession and control. In our case the

company is under such duty. Appropriately we may add that the burden of proving this case always remains with plaintiff as, even with the aid of the doctrine, the plaintiff continues under the duty of convincing the fact finder that the injury resulted from negligence and the defendant was guilty of the negligence. We said in *Union Pacific Rd. Co. v. Stanger*, (9 Cir.), 132 F. 2d 982, 984, 'The rule of *res ipsa loquitur* is not merely a rule of evidence shifting the burden of going forward with proof, for the inference of negligence under the rule does not disappear when met with substantial credible evidence of due care. It remains in the case throughout to be given consideration by the trier of fact in his weighing of the whole case with the burden of proof remaining with the plaintiff to the end.'

"It was the company's duty to fasten the trucks on the flat car securely, and it thereby failed in its duty to provide a reasonably safe and proper place for appellee to work. The car was in the exclusive possession and care of the company during all of the relevant time and the company was charged with the duty of keeping the truck fastened in such a way that it could not move about. The circumstances brought the doctrine of *res ipsa* into play."

Having established a prima case by showing the collapse of the canal, and the failure to deliver water and having the benefit of the *res ipsa* rule creating an inference of negligence the question arises: Was plaintiff's case overcome by defendant's evidence? The court failed to find that defendant used due care. A finding to this effect would be necessary to overcome plaintiff's case.

The court made no findings indicating that the defendant met the burden on either of these issues.

This brings into operation the rule that a failure to find on these affirmative issues constitutes a finding against the defendant. The rule is exemplified in the following cases.

THE COURT MADE NO FINDING WHICH EXONERATED DEFENDANT FOR BREACHING ITS CONTRACT DUTY TO DELIVER WATER OR TO MEET THE OTHER BURDENS ON DEFENDANT.

The defendant had the burden of proving a defense for failure to deliver water, as well as the burden of meeting the weight of the *prima facie* case established by plaintiff.

The court made no finding on this issue, and failure to do so is equivalent to a finding against the defendant. Out of the many authorities on this question we cite the following.

In *53 Am. Jur.* (Trials) P. 796, Section 1143, we read:

"It has been said that if the Findings of Fact made by the trial court leave some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof."

Among the cases cited in support of the above text, is *Erie R. Co. vs. Callahan Co.* (Ind.) 184

N.E. 264, 87 A.L.R. 778, involving damages for alleged shipment of freight, where we read: (780 A. L. R. Cit.)

“The court having found that completion of the shipment was delayed in unreasonable time, the burden was upon appellant to show that the delay was not caused by its negligence, and a failure to find any fact on the subject is a finding against appellant. (Citing several cases)

In *64 C. J.* p. 1236, we read:

“An omission of the finding to cover a particular fact or issue is to be deemed a finding on the fact or issue against the party having the burden of proof.”

The rule is followed in the recent case of *Burlington Transportation Co. vs. Wilson* (Nev.) 114 P. (2) 1094 where we read: (1095)

“The burden of proving that respondent’s car was parked on the wrong side of the road was on appellant, and the existence of this fact was necessary to establish appellants defense of contributory negligence. The findings being silent as to this fact, the presumption is that it did not exist.”

In *Ingle vs. Ingle* (Wash) 48 Pac. (2) 576 we read: (577)

“It is first contended by appellant that the action is barred by the statute of limitations. Appellant set up the statute of limitations by way of affirmative defense. The court made no finding on the issue so tendered. The rule sup-

ported by the weight of authority is that, where the findings of fact are silent upon a material point, it is deemed to be found against the one having the burden of proof." (Citing authority)

The duty of meeting the burden of proof creates the same burden as though the exculpatory facts were affirmatively alleged, hence calls for a finding on whether or not defendant met the burden and the absence of such finding is to be considered as a finding against defendant.

**THE JUDGMENT DISMISSING PLAINTIFFS
CASES IS CONTRARY TO THE LAW AND
TO THE EVIDENCE AND THEREFORE
CLEARLY ERRONEOUS**

We point to the following specifications of evidence in support:

1. Plaintiffs cause of action is based on defendant's failure to deliver water for irrigation. It is plainly so stated in the complaint. Proof of the contract and its breach made a prima facie case. The court considered the case on the basis of a pure tort and placed the burden of proving negligence on the plaintiff.

2. Plaintiff proved, the defendant admitted, and there is no dispute concerning the fact that defendant constructed the North Canal over a porous terrain, that the soil was incapable of holding water,

that the canal was unlined, and as a result absorbed water to the point of breaking.

This constitutes negligence in Oregon as well as every other jurisdiction where the issue has been passed on.

3. Defendant's inspection of the North Canal was wholly inadequate to justify an inference, or finding of due care in this respect.

4. It is admitted that there was a total lack of any inspection of the North Canal, after the first break and prior to the second break, and that an inspection would have disclosed the dangerous condition of that segment, which broke almost immediately when water was turned into the canal.

5. Plaintiff proved and the record demonstrates that an excessive amount of water was turned into the canal prior to its complete repair and while the bed of the canal was still several feet below normal grade at the point where the second break occurred.

On these essential points there is no conflict in the evidence. Any finding of fact contrary to these is clearly erroneous.

6. The court erred as a matter of law in failing to apply the rule of *res ipsa loquitur* to the facts of this case and to place the burden on defendant of proving the reason of defendant's failure to perform its contractual duty to deliver water.

THE COURT ERRED IN FINDING THAT

CLAIMANT FAILED TO ESTABLISH THAT DEFENDANT DID NOT USE REASONABLE CARE IN THE CONSTRUCTION, MAINTENANCE, OPERATION, INSPECTION OR REPAIR OF SAID CANAL. (Finding No. 18)

On these cardinal elements of negligence, there is no dispute in the facts, viz: There is no dispute that (1) because of the nature of the stratum over which the canal was built, the water leaked through the canal (either the bottom or bottom and sides) causing a saturated condition which would not sustain the canal.

(2) Or that no adequate core wall was constructed in the canal bank.

(3) Or that no inspection was made at the point of the break to determine the presence of leaks and seepage below the canal.

(4) Or as to the manner in which, or the amount of water, turned into canal prior to the second break.

(5) Or to the unfinished condition of the canal at the time this water was turned in.

(6) Or that there was no inspection of the condition of the segment of the canal that broke the second time.

On the above issues, there is no question of preponderance. The evidence points directly to negli-

gence, without contradiction and is based largely on the testimony of defendant's witnesses.

So far as any inference which the court might draw from the testimony, we suggest that none of the claimants witnesses have filed a claim for damage in the proceeding and are wholly disinterested, that their testimony was positive and affirmative, while the defendant's witnesses (with exception of Mr. Clours who operated a tractor) were all employees of the defendant and charged with the safety of the canal. Their testimony on the issue of negligence was wholly negative. They simply say they did not see what claimants witnesses positively assert was present.

A failure to find negligence on this record is to arbitrarily ignore the probative force of the uncontradicted evidence.

In *United States vs. United States Gypsum Company*, 333 U.S. 364, 92 L. E. 746, the Supreme Court reviewed the record, and in reversing a judgment of dismissal said: (766)

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In that case the government had the burden of proving a conspiracy in restraint of trade and although there was positive oral testimony to support

the trial court's findings (which is lacking here) the Supreme Court had no difficulty finding them against the weight of the evidence and erroneous.

In *George vs. Capital Tractor Co.*, 54 App. D. C. 295 Fed. 965, the trial court granted a judgment in favor of the defendant Tractor Company. In reversing, the Circuit Court of Appeals for the District of Columbia, after reviewing the facts, said: (968)

"The uncontradicted and unimpeached testimony in the case discloses no negligence on the part of the plaintiff, and proves at least prima facie that negligence of defendant's motor-man was the direct and immediate cause of the collision."

After recognition of the rule in cases of serious conflict in the testimony the court continued: (968)

"But where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

This Court in *Smith vs. Royal Ins. Co. Ltd.* 125 Fed. (2) 222, in setting aside findings and directing a judgment for appellant said:

“The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding. (Citing authority) The doubtful situation should have been resolved against the party upon whom rested the burden of proof.”

So here, there being no conflict in the material testimony, and the decision being based upon an erroneous theory of the law, the findings are not conclusive upon the claimants who are asking for review.

THE TRIAL COURT'S OBSERVATIONS AND INFERENCES ARE CONTRARY TO THE EVIDENCE.

Throughout the Court's opinion (TR. 63-68, 93 Fed. Supp. 779) are many observations and expressions of opinion which are contrary to the facts. The inferences which the court drew are unwarranted and have no reasonable foundation in the record.

In addition to the inconsistent inferences discussed *supra* (pp. 55, 61) we point to the following: (TR. 65 et seq., 93 Fed. Supp. 783)

“A careful examination of the evidence shows that the cause of the break was never established, and remains conjectural.”

Under the *res ipsa* rule plaintiffs would not be required to prove the cause of the breaks. However, we did prove facts from which the only logical inference could be that the canal banks or bottom, and it doesn't matter which, became so water soaked that they gave way.

More than that, Mr. Gordon, Mr. Carter, Mr. Newell and Mr. Spofford, of defendant's staff of engineers, testified as experts on this point and epitomized their observations in statements of which the following from Mr. Gordon's is typical.

"A. I think the cause of the first break was very similar to the cause of the second break, which I observed, in that a stratum located at some depth below the bottom grade of the canal actually failed structurally. By that I mean it collapsed, it lost its homogeneity, it broke down structurally.

Q. And what was the cause of its breaking down, in your opinion?

A. I believe the introduction of seepage through the bottom of the canal and through broken joints had allowed the stratum to saturate, and it was in places, the point of the breaks, under full flotation, completely lubricated, and without sufficient internal structure to resist the load that was placed on it."

Surely, there is nothing conjectural in this very plain testimony. It is the direct result of cause and effect.

Again TR. 66, 93 Fed. Supp. 784 in discrediting

the effect of the water logged condition immediately below the point of the break, the court said:

“This latter testimony, in the opinion of the court was quite weak. The court was not convinced that any observed conditions referred to did not come from surface water. Nor is great weight to be given testimony concerning the miring of a tractor and a wet condition of soil in the field immediately below the place where the break subsequently happened. The water in the lateral of the farm within a few feet from the toe of the canal bank was, in our opinion, casual. It was either surface water or rain. *As a matter of fact at the time this water showed up, the canal had no water in it since the stream had not yet been required for irrigation.* (our italics) * * * Experience in the irrigation country does not indicate that such circumstances would be taken as indications that a break was going to occur in the main canal.”

This thinking is contrary to the opinions of the experienced engineers called by defendant who testified that such circumstances gave cause for alarm. (Carter TR. 579-580, App. 156-7, Newell TR. 507, App. 155)

The fact that these indications showed up before the irrigation season began, only accentuates the fact that a large amount of water was reservoired in the water soaked banks of the canal. In fact under those conditions, when the canal had been empty since the close of the previous irrigation season, the only logical conclusion or inference to be drawn was that the canal had leaked so thoroughly

that this reservoir was created, which was conclusively proved when the engineers finally tested the bank which remained standing after the second break.

Again, we read in the opinion. (TR. 69, 93 Fed. Supp. 779, at p. 785)

“At that time (after first break) no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered.”

To the contrary, in repairing the first break, porous structures were discovered three to four feet in thickness, Exhibit 80, reveal the same structures in the upper canal back some three hundred feet up and down the canal bank and the repair revealed that no core wall had been placed in the canal bank.

In his opinion, the trial Court alludes to the duty of the land owners to report the condition which they observed, in the Shaw field, and on the Hust ranch. We read (TR. 67, 68, 93 F. Supp) at p. 784:

“Certainly, these springs were well known to the whole country side, and, if anyone had believed that they were a source of peril, the matter would have been taken up in protest by the landowners on whose property these appeared and other irrigators who depended on the canal for their crops.

* * *

“The farmers themselves, in an irrigation coun-

try, are concerned with the maintenance of the main canal, and, if there were any such circumstances which would call attention to the ordinary man the fact that the canal was apt to break, they unquestionably would have been reported to the Government and we would have had testimony that such warnings were given. There is no such testimony in the record. There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break because of the circumstances mentioned. The Court holds that the absence of ordinary care in this respect has not been demonstrated by this showing.

“The next question is as to the competency of the inspection. It is not contended that there was no inspection. This, of course, would have been contrary to fact.”

Of course, the defendant's irrigation manager (Spofford), General superintendent (Newell), Engineer (Carter) and ditch rider (Pettet) had known all about the leaks 300 feet north of the break, and the leak on the Hust field for some three or four years, and did nothing about them. Why should a farmer become alarmed over a further leak on the Shaw place if these officers of defendant could see no danger in more pronounced danger spots? Besides there was no duty on the farmers to give further warning.

We read in *65 C.J.S.* p. 598, Section 89:

“A person who had nothing to do with putting into operation or continuing in operation the dangerous agency is under no duty to warn another of approaching or impending danger.”

At another point in his opinion the Court apparently dismissed the necessity of anticipating danger because the structure had stood intact at this point since 1936, when it was built. We read: (TR. 65)

“A great quantity of water has flown over the dam and through the Owyhee Canal since construction. The Court is of opinion that the canal itself built up a protective covering over these structures, which was only gradually permeated by water. We hold that eleven years of use of this canal would lead persons charged with only the duty of ordinary care to believe that the construction was proper and that the canal would hold a full head of water over irrigation season in the absence of other circumstances tending to destroy that belief.”

The effect of this reasoning is directly contrary to the testimony of defendant's engineers and experts which indicates that percolation and seepage through the canal bed and bank might have been slow and over a long period of time.

Mr. Carter, defendant's witness and engineer, testified that percolation through the walls of the canal might have taken years. In describing what the action of percolating water would be he stated that it might take a long time to bring the result that happened. (TR. 569).

Mr. Senger, defendant's expert witness, testified: (TR. 780)

“ * * * We had a failure in a canal on the Idaho

Power Company systems, when the thing had been operating twenty years."

The fact (alluded to by the Court (TR. 65, 93 Fed. Supp. 784) that the canal had been in operation for eleven years before it failed is no evidence of proper construction.

In 65 C.J.S. p. 1081, Section 243 we read:

"Where a building falls of its own weight without any external violence, the fact that it has stood for a number of years without falling is very slight evidence that it was properly constructed and of suitable material."

The editors cite *Waterhouse vs. Joseph Schlitz Brewing Co.* (S. Dak.) 81 N.W. 725, 48 L.R.A. 157 where we read: (727 N.W. Cit)

"The contention of appellant that the statement in the complaint that the building had been owned and used by the defendant for more than 10 years tends to contradict the statement that the building was negligently and improperly constructed, is not tenable. From the fact that the building fell of its own weight, without any external violence, a fair presumption would be that the fall occurred through adequate causes, one of the most natural of which would be the negligent and faulty construction of the building itself. The fact, therefore, that it had stood for a number of years without falling, would afford very slight evidence that it had been properly constructed, and of suitable material."

CONCLUSION

We apologize for the extent of this brief. However, the record presents numerous questions involving the duties of water serving agencies which are of utmost importance to the Government in this case and to every other agency engaged in that service. Likewise, every water user, both on Government projects and in irrigation districts, is vitally interested in the principles which we have attempted to discuss.

The economic welfare of many thousands of water users, who spend generations of time and vast sums of money in repaying the construction costs and operation and maintenance expense, should be protected against the failure to receive the water contracted and paid for.

It may be anticipated that similar controversies may arise, under the present Federal statutes, and that a comprehensive decision of the issues involved here will clarify the rights, duties and obligations of the parties involved.

It is hoped that these considerations may justify the extent and scope of this brief.

Respectfully submitted,

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APPENDIX TO APPELLANTS BRIEF

In an attempt to aid the court we have set out in black face type the page number of the record where the quoted testimony is referred to.

TR. 301

A. C. Merritt, plaintiffs witness, testified:

“The formation, as generally accepted by geologists, is a very old formation of lakebed and windblown rocks, laid down by water, eroded by wind and laid down again.”

And: (Tr. 310)

Q. What is the nature of that stratum in (exhibit) 73 which shows the break?”

* * *

A. That is a very soft sand formation, sandy.

Q. Any other ingredient in it?

A. Well, there is some very soft sandstone involved in it that is pretty well broken up, as at a point indicated opposite the leveling rod, at this point. (Indicating)

Q. Were you able to determine the thickness or depth of that stratum as shown in No. 73?

A. It would be very difficult to determine the exact thickness, because it varies at different points, but I would say the average thickness might be from two to four feet.

TR. 340

A hypothetical question was propounded to both Mr. Merritt and Mr. Bouton, as to their opinion of the cause of the break, to which Mr. Merritt answered. (TR. 343)

TR. 343

" * * * that the canal was dug through a pervious stratum and that stratum continued to absorb water over a period of years until it became saturated and somewhat in a liquid state and in that condition would not support the bank that was built on the slope of the hillside where the canal cut through."

TR. 426

Mr. Bouton answered: (TR. 426)

"Thoroughly saturating that bank below through that pervious material caused the bank to give way. There was nothing there to stabilize it. Naturally, when it became thoroughly saturated something had to give and the bank went out."

TR. 414

This witness further testified (TR. 414) that he examined the stratum shown in Exhibit No. 73.

"Did you pay any particular attention to the formations found in the photographs, shown by Exhibit No. 73, for instance?

* * *

A. Yes; I came down the canal at the time Mr. Bronken was standing there with the rod.

Q. Did you make any personal examination of the stratum that is shown there near where Mr. Bronken is?

A. Yes, in that it is a very porous formation."

TR. 121

Mr. Paul Bronken testified on redirect examination. (TR. 121)

"You spoke about the outcropping of this porous area being in the bed of the canal. Does the exhibit that delineates that—which is it? Eighty-one?

A. Both 80 and 81 do.

Q. Well, does 80 show about the proper location of that porous structure in the canal bed and on the opposite bank, the upper bank?

A. Yes, sir."

And was recalled by plaintiff and he testified: (TR. 446)

"My opinion is that when the water enters this pervious formation as shown on Exhibit 80, it is on an incline toward the valley. In other words, as water enters there you are going to get a hydrostatic head that will keep pushing the water through the formation, and since you have a source of water there is no reason to believe that in time it won't completely fill until it crops out someplace and comes out on the surface.

Q. In other words, it would follow on down

this pervious structure until it found an out-cropping where it could get out?

A. Yes, until it found some weakness where it could free itself.

Q. Did you find in that vicinity any spots where the water is coming up at the present time?

A. Yes, sir. The most prominent one is to the south of the break, in a neighboring field there. We observed a flow of water there coming out of the middle of the field. I would imagine it is about, oh, somewhere between a hundred and a hundred and twenty-five feet down the slope from the toe of the canal bank. It just bubbles right out of the ground there."

TR. 702

Mr. Spofford, defendant's witness, testified: (TR. 702)

"I am no geologist, and the—the canal, I would say, was through this formation—some call it the Payette formation, or Idaho formation. It is strata of fresh water deposits of various natures."

TR. 571

Mr. Carter, defendant's witness, testified: (TR. 571) on direct examination.

"Q. And now would you continue with your statement as to the premise upon which your opinion is, and your opinion as to the cause of the break?

A. What I believe happened is that water seeping down through the bottom of the canal

over a period of time, whether long or short I don't know, but eventually enough water found its way into this bottom stratum to saturate it, cause it to lose its stability, its ability to withstand weight or pressure, probably getting into almost a fluid state, in which condition it gave away and the canal bank went with it."

TR. 618

Mr. Gordon, a witness for defendant, and an engineer who was in charge of the repair of both breaks testified. (TR. 618)

"Q. I will ask you this question: What, in your opinion, from your experience as an engineer and your observations here and your own work in the bottom of that canal, was the cause of the first break?

A. I think the cause of the first break was very similar to the cause of the second break, which I observed, in that a stratum located at some depth below the bottom grade of the canal actually failed structurally. By that I mean it collapsed, it lost its homogeneity, it broke down structurally.

Q. And what was the cause of it breaking down, in your opinion?

A. I believe the introduction of seepage through the bottom of the canal and through broken joints had allowed the stratum to saturate, and it was in places, the points of the breaks, under full flotation, completely lubricated, and without sufficient internal structure to resist the load that was placed on it.

Q. And what was, in your opinion, the cause of the second break?

A. I think it failed in the manner I have described, similar to the one I have described, by the failure of the stratum below the bottom grade of the canal, which collapsed, allowed the bank to move out and down."

TR. 668

On cross-examination this witness testified:
(Tr. 668)

"Q. All right, what was your conclusion as to what caused the first break that you arrived at at the time you fixed it?

A. I concluded that it might have failed by failure along some joint in the underlying stratum. I couldn't find such a joint by examination up and down the stream, but that was the best conclusion I could draw at that time.

Q. And then when you went on to repair the second break you changed your conclusion you had arrived at at the time of the first break?

A. I watched the second break. I was standing right at it.

Q. And your conclusion now is that both breaks were caused by the giving way of the stratum at the canal bank?

A. I think the causes were very similar."

TR. 511-512

Mr. R. J. Newell, defendant's witness testified on cross-examination: (TR. 511-512)

"A. I believe that the first break was caused

by a condition below the bottom of the canal under the outside bank.

Q. All right, will you describe the condition you think existed there?

A. There must have been a stratum of material that when saturated lost its stability and ability to hold up the canal bank.

Q. All right, where would the water come from that saturated that segment?

A. Down through cracks in the intervening layer between the bottom of the canal and this particular stratum.

Q. That is, you are now assuming that there was a porous stratum underlying the bed of the canal?

A. I get tangled up with the term "porous," but there was a weak stratum under there which, when saturated, would not support the bank.

Q. All right; and why would it be weak? If you don't like the word "porous," why would it be weak?

A. On account of the character of the material itself that was not sufficiently stable when saturated.

Q. When saturated. And where, again, would the water come from to saturate it?

A. Down through cracks or crevices in the bottom of the canal."

TR. 215-220

Mr. Percy, plaintiff's witness, testified: (Tr. 215-220)

(TR. 215)

"Q. What, generally, were your instructions, Mr. Percy?

A. Well, they sent me and Tom in the morning to get some water to fill this cofferdam, and, of course, the laterals were open and that didn't come up, and so they sent us up to get it so that they could use some of the water on that fill.

* * *

Q. And what time of the day did you start out to get this water down?

A. Well, it was around four o'clock, I would say.

Q. Four o'clock in the afternoon?

A. Yes.

Q. At that time were they still working on building up the embankment?

A. Oh, yes, yes." * * *

(TR. 216-220)

"Q. How many of those sack dams were there in the ditch (130) between the break and, say, Sheep Creek siphon?

A. Well, if I remember right, there was four or five.

Q. And how many gates were there between the break and Sheep Creek siphon?

A. Well, that is—I couldn't say for sure, but I imagine about eight or ten, somewhere along in there.

Q. And what did you do towards closing the gates?

A. We just shut them all down and locked them.

Q. And did you take out these temporary dams that were in there?

A. No.

Q. They were left in?

A. We left them in.

Q. Now, will you describe for the record just what Sheep Creek siphon is?

A. Well, it is just a big check right at the head of the pipe.

* * *

Q. Does that siphon carry the entire flow of the North Canal across the Sheepshead Creek (sic)?

A. Oh, yes.

Q. Now, was there anything done at the upper end of the Sheep Creek Siphon to stop the flow of water?

A. Yes, there were some checks in there.

Q. Just what were they? What was the nature of those checks?

A. They were 4 by 6 timbers, if I remember right.

Q. Were they placed across the face of the siphon?

A. Crossways, whatever the check is.

Q. And were those checks in there when you and Mr. Kuhnley and Mr. Pettet got up there?

A. Yes.

Q. How much of the water, of the flow of the canal, was held back by the checks in Sheep Creek siphon?

A. Well, I don't know, I have never had too much experience above there, but it was quite a body of water; it went back up quite a long ways.

Q. Was the ditch pretty well filled above Sheep Creek?

A. Well, yes, it was up pretty well, you know. Of course, they had Sheep Creek checked pretty high, you see, and it was filled up pretty high.

Q. And when you say 'filled up pretty high' you mean the check boards were up pretty well toward the top?

A. Well, pretty well, yes.

Q. What did you do towards releasing the water that was backed up by these boards?

A. Well, we pulled the checks out.

Q. When you say 'checks' do you mean—

A. We pulled the planks out, you see, check boards.

Q. Did that release the volume of the water that was held back, then?

A. Oh, yes.

Q. And how many of the check boards did you pull out?

A. If I remember right, it was four.

Q. How far down did that release the water from the head of the siphon?

A. Well, I would say about two feet and a half, something like that.

Q. All right, then how far is it from the head of the siphon up to the Lockett Spillway?

A. Oh, I would say around three miles, something like that.

Q. Did you notice the amount of water that was in the canal between those two points as you were going up the stream, the canal?

A. Well, I didn't pay no great lot of attention to it, no. It was a pretty fair head of water. It was checked so, you know, so that you couldn't really tell what the flow of it was.

Q. No, I was asking the volume of water in the ditch. Was the ditch pretty full?

A. Well, no, I wouldn't say awfully full. I would say it looked and viewed to be up to normal.

Q. What is the apparatus in the ditch at Lockett Gulch which controls the flow of water in the ditch?

A. Well, I don't know just how to explain it. They are maintained on a wheel, on a headgate, you know. You maintain your steel gates.

Q. Steel gates across the canal?

A. Yes.

Q. And how many of those gates are there?

A. Two.

Q. Side by side?

A. Yes.

Q. And does that control the flow of the water down the canal?

A. Uh huh, I think it does.

* * *

Q. When you got to Lockett Gulch, Mr. Percy, how far open were the gates?

A. Well, I would say about two feet. They open from the bottom up, you know.

Q. From the bottom up to the gate was about two feet?

A. Uh huh.

Q. Do you know how wide across those gates are?

A. No, I don't. About eight or ten feet, though, the others are, I think.

Q. What was done towards opening the gates any further?

A. Well, Tom opened one and I opened the other one.

Q. How far did you open them up?

A. Oh, I would say we raised them about two feet.

Q. That would make the total clearance under the gate four feet?

A. Yes, somewhere in there.

Q. Did you observe the amount of water that was released and going down the ditch after the gates were open?

A. Well, no, I really didn't. You know, I had never seen that particular ditch. It is pretty hard to guess on a ditch you have never seen under pressure, you see.

Q. Was that water under pressure under the gates, coming out?

A. Oh, yes."

TR. 150-151

Mr. Hawkins, plaintiffs witness, testified on direct examination: (Tr. 150)

"A. Well, we had just arrived home, between six and seven o'clock, or I would say about—I wouldn't say exactly, but we had come home from our work and I imagine it was between six and seven o'clock, we were just starting out, and we heard a noise, looked out,

and someone said, 'There water comes over the canal again,' and we started to run; we run up there as fast as we could.

Q. What was the condition that you found, when you got there, as to the water?

A. The water was running full length over the fill that they had put in.

Q. And over how long an area?

A. Approximately fifty feet, fifty or sixty feet.

Q. In other words, they had got fifty or sixty feet of canal built and the water was running over that bank?

A. It was all on a level, as near as I remember.

Q. You mean the water and the bank?

A. Yes, and the water was coming directly over the bank.

Q. How high, if you know, was the new bank built up to, or could you tell?

A. Couldn't tell exactly.

Q. Well, how long did you stay there?

A. Oh, approximately an hour and a half.

Q. And did the water continue to run over the new fill while you were there?

A. That is right.

Q. Was it still running over when you left?

A. Yes.

Q. And about what hour would you say that you left there that evening?

A. Nearly dark."

TR. 680

Mr. Gordon, cross-examination: (TR. 680)

"The Court: Now, if you had been trying to be sure that this break would not have occurred you would have then made the experiment that you subsequently made; that is, you would have put your dragline down to see what was below in a place beyond the break on each side? That is what you subsequently did.

A. That is right. I don't know if this is proper. Could I explain that a bit?

The Court: Yes.

A. The first break we had no evidence that upstream or downstream we had any unsoundness. That canal bank had stood for twelve years and, to the best of my judgment, if I could put a patch in there that would hold the canal should go on serving. At the end of the second break I realized that I had missed something the first time and that there was not going to be any run-around on the second time, I can assure you. The evidence was not there, even in the second break, that I could point to and say that 'this is what caused it,' but I wanted to be sure and I was not going to be embarrassed again by another break, so I instructed that dragline to dig in there and dig deep to see if I was again missing the point, and immediately ran into the reason."

TR. 646-647

“Q. And at that time the bottom of the canal at its deepest place was three feet below the normal surface?

A. Approximately.

Q. And a more or less distance below for the entire length of the break?

A. That is right. The silt was not in itself sufficient material to complete the repair in the bottom of the canal.

Q. What were you going to do then?

A. We were going to blanket that with pit-run gravel.

Q. But you hadn't got around to working at that yet?

A. Well, that was a question of getting delivery fast enough at that point, and we planned to put the gravel on during operation.

Q. But no gravel had been put into the bed of the canal before the water was turned in?

A. No, sir.

Q. And that, you say, was about 8:00 o'clock Wednesday evening?

A. That is correct.

Q. Now, that area where the ditch bed was still below surface, would that extend far enough north to be opposite where the second break took place?

A. Yes. Not at the full three-foot depth, though.

Q. No, no, I appreciate that. Then for an area three hundred fifty feet above the break and a hundred to a hundred and fifty feet below the break the ditch bed was exposed and not brought back to level at the time you turned the water in Wednesday evening?

A. I will agree it was not back to level. I don't quite understand what you mean by exposed."

TR. 643-644-645

"Q. Now, as I understand your testimony, the entire bed of this canal was either washed away or washed down very low, both sides of the first break?

A. There was considerable erosion, yes, sir.

Q. How far upstream did the eroded surface end?

A. Approximately three hundred fifty feet.

Q. Would that be about where the cofferdam was?

A. That is correct.

Q. Then from the cofferdam on down to the break it had eroded down to where it had reached a depth of some seven feet below the normal bottom of the bank?

A. That is right, about the line of the inner toe of the bank.

Q. And it had eroded also on the downstream side?

A. That is correct, but to a lesser extent.

Q. That was because of the water running back?

A. That is correct.

Q. And what area of the bottom of the canal showed that erosion, for what distance up and down the canal?

A. Well, it wasn't uniform completely across the width of the canal.

Q. I appreciate that, but for what distance up and down the canal? Three hundred and fifty feet from the upper end, and how far down below?

A. Oh, I would think about one hundred fifty feet—about one hundred feet, I would say.

Q. That would be approximately four hundred fifty feet?

A. That is correct.

Q. Now, in making your repair, and after you got your key wall in, had you finished that work before the water was turned in?

A. I don't understand you. Finished what work?

Q. The raising of the bottom of the canal up to grade?

A. No, sir, we hadn't intended to finish it. We had—

Q. The bottom of the canal hadn't been raised up to grade before you turned the water in?

A. That is correct.

Q. How far below the bottom of the grade do you think it was, Mr. Gordon?

A. Well, that was a varying proposition. I think the maximum was about between three and four feet.

Q. And then it would feather out toward either end?

A. That is right."

TR. 704

Mr. Spofford testified:

"Well, in this trip in the morning they thought they had turned down the right amount and in the afternoon the water hadn't reached the place so the instructions were given for the man to go up the canal and turn down more water.

* * *

The second time the men went up for more water they stated that they took several sacks out of this dam and they proceeded up the canal and lowered two more gates turning more water into the canal."

TR. 238

Mr. Terhune, plaintiffs witness, testified on direct examination: (TR. 238)

"Q. From that section of the break down to the cofferdam did you find any evidence of a

core or core wall of any sort to the original ditch?

A. No, there was no evidence of any core being used whatsoever in the bank and showing in the break."

TR. 277

On cross examination this witness testified:
(TR. 277)

"Q. You made some statement relative to that you had not observed any evidence of core in the bank. What did you mean by that?

A. There was no indication, when we started the excavation for the core bank in the sandstone material, that there had ever been a core bank there before in any part of it, because we cored back beyond the washes on each side."

TR. 609

Mr. Gordon, defendant's witness, testified:

"A. There was a flow of water about an inch deep, from one to two inches deep, over a portion of the patch.

Mr. Hess. Q. What portion would that be?

A. It was the downstream, the extreme downstream portion of the patch was overtopped first. That flow of water washed about three inches of loose material from the top of our patch. That was material which could not be normally compacted by the operation of our equipment. There was only a certain amount of loose material on top."

TR. 253-257-258-259

M. Terhune, plaintiffs witness, testified:

“Q. It didn’t carry the water?

A. It didn’t carry the water.

Q. What happened?

A. It went over the top of the place where we were clearing. * * *

Q. To what depth did the water go over—

A. I would say to a depth of about three to four inches.”

* * * (257)

“Q. Now, after Mr. Clower’s outfit had endeavored to stop the flow of water by spreading earth on top of the fill did he have any success in stopping the water with that operation?

A. No, sir, he did not.

Q. What then did he do?

A. They went up to the cofferdam and started to plug that back so that we would have a cofferdam across and shut the flow of water off.”

* * * (258)

“Q. Then what became of the water on the downstream side of this plug?

A. It continued to flow over the bank for quite some little time until that point of the operation is where my rig got back up on top and the two of us started to building the dike up, which we soon had it stopped going over the top."

* * * (259)

"Q. How long after he had plugged the canal did the water continue to run over the fill at the point of the subsequent break?

A. I don't believe it continued to run over more than an hour afterwards, if quite that long."

TR. 658-59

Mr. Gordon testified:

"Q. * * * Now, when you started to clear away the debris from the second break how far back were those banks entirely water-soaked? You spoke something about it being a sort of a loblolly that you ran into there.

A. Well, I testified that the inner face of the outer bank was soaked for a distance of about two feet. The wettest stratum we found was the one below the bottom grade of the canal. That had very little structure.

Q. By that you mean it was almost fluid mud?

A. That is right. A slight disturbance would just break it down completely. If you kicked it with your foot it would collapse, it would break down into almost quick sand."

* * * (659)

“Q. Now, were you familiar with the fact, or the alleged fact, that the ditch was leaking, or that there was evidence of water rising—I will put it that way,—in the Shaw field for the whole distance under both of these breaks?

A. I don't know just how to answer that question. I heard the testimony to that effect but I don't believe it.

Q. I see. Well, if those are the facts, wouldn't that indicate that there was seepage getting through the canal walls there, either below or above the water line, or above or below the bottom line of the ditch?

A. Well, I think we could agree that if there was seepage there must be a seepage somewhere, yes, sir.

Q. Yes; and you will also agree, won't you, that if there was seepage that it was coming from a water supply, a water source?

A. I think that is correct, yes, sir.

Q. And you will go one step further and say that it had to come out of the ditch, won't you?

A. I think in large part.”

TR. 616-46-47-48

“Q. And you were not through and had not completed, as we understand your testimony, your first repair when this blowout happened below that where you were repairing and doing that work?

A. That is correct. The operation was still going along as fast as we could prosecute it."

* * * (646)

"Q. And at that time the bottom of the canal at its deepest place was three feet below the normal surface?

A. Approximately.

Q. And a more or less distance below for the entire length of the break?

A. That is right. The silt was not in itself sufficient material to complete the repair in the bottom of the canal.

Q. What were you going to do then?

A. We were going to blanket that with pit-run gravel.

Q. But you hadn't got around to working at that yet?

A. Well, that was a question of getting delivery fast enough at that point, and we planned to put the gravel on during operation.

Q. But no gravel had been put into the bed of the canal before the water was turned in?

A. No, sir.

Q. And that, you say, was about 8:00 o'clock Wednesday evening?

A. That is correct.

Q. Now, that area where the ditch bed was

still below surface, would that extend far enough north to be opposite where the second break took place?

A. Yes. Not at the full three-foot depth, though.

Q. No, no, I appreciate that. Then for an area three hundred fifty feet above the break and a hundred to a hundred and fifty feet below the break the ditch bed was exposed and not brought back to level at the time you turned the water in Wednesday evening?

A. I will agree it was not back to level. I don't quite understand what you mean by exposed." * * * (648)

"Q. Well, as a matter of fact, twenty second-feet wouldn't have run over the bank of the canal?

A. Well, you must remember that when I cut the cofferdam I had to release the water that was stored behind the cofferdam also.

Q. I understand; and that would have caused a flow of more than twenty second-feet?

A. That is correct."

Q. And, as a matter of fact, it would have caused a flow big enough to run over the embankment?

A. That is correct."

TR. 245-46

Mr. Terhune testified:

"Q. Are you able to state about the height

to which the fill had been raised at the time the water went over it?

A. No, that is pretty hard to say exactly where the fill was at the time the water went over, because we had—The bottom of the ditch, if it had stood when we brought the grade up, was much lower than the bottom of the ditch as it should have been. We had a bank approximately ten or twelve feet up above the bottom of the ditch at that time.

Q. And, as I understand, you are unable to state how the bottom of the ditch as it stood then compared with the bottom of the normal grade of the canal?

A. No, it would have been hard to have said where the bottom grade of the canal should have been.

Q. Was the bottom of the canal there higher or lower than the normal grade?

A. It was lower, much lower, than the normal grade would have been of the bottom.

Q. Would you be able to make an estimate of the number of feet lower?

A. Well, not accurately, but I would say it was at least two or three feet below, anyway, the bottom grade—that is, the true bottom grade of the canal as it should be.”

TR. 497

Mr. Newell testified on cross-examination:

"Then there is testimony, also, that the ditch broke just ten or fifteen feet north of where they terminated the core wall and broke the old bank wall. You heard that, too?

A. I heard that.

Q. Have you arrived at any conclusion as to whether the break was caused by water running over the new fill or by the fact that they did not extend the core wall up far enough north when they made their first repair?

A. I have an opinion that it was not caused by the overflow but that the repair did not reach far enough downstream in the first case.

Q. That is your opinion now, that that is what may have caused the second break?

A. Yes, sir."

TR. 677

Mr. Gordon, defendant's witness on cross examination:

"Q. Just one question, Mr. Gordon: After you had made this first repair did you carry out any experimentations, like drilling in the base of the canal, to determine whether or not there was a similar stratum down where the second break took place?

A. After the first repair?

Q. Yes.

A. No, sir."

The Court interrogated Mr. Gordon. (TR. 678-679)

“Q. * * * A competent engineer would have found out what the trouble was, or have done the best he could to find out?

A. I would think so.

Q. The Court: As a matter of fact, you can find out, can't you?

A. We certainly try. Sometimes we miss, but we usually do.

The Court: If a competent engineer was trying to put in a structure that he knew would stand, he would find out what was there, wouldn't he?

A. Yes, sir. * * * (682)

The Court: * * * You know that this seepage is down in the Hust field?

A. Yes, sir.

The Court: And you don't know where it comes from?

A. That is correct.

The Court: And you know that there is some seepage to the north?

A. Yes, sir.

The Court: And you don't know where that comes from?

A. No, sir.

The Court: Have you missed something again?”

TR. 578-79

Mr. Carter, one of the defendant's witnesses and engineers testified on cross-examination:

"Q. You state that the second break was caused from the same reasons that the first break was caused, which was the result of saturation of materials in the bank. Couldn't that have been determined by testing the materials before repair following the first break?

A. Yes, sir, it could have been.

Q. And it was not?

A. But it was not, that is right."

TR. 689-90

Mr. Spofford testified:

"Q. Would you state, particularly with reference to the North Canal, what security measures have you taken that it is properly maintained?

A. In the operation of a canal the size of the North Canal, which carries 1100 second-feet at the head, in my organization instructions are given to the three watermasters and the ditch riders to use extreme care in patrolling these canals during the irrigation season especially to look for new leaks or seepage.

Q. What are the duties of your ditch riders?

A. The ditch rider, during the irrigation season, which constitutes about seven months of the year, rides a section—in this particular

reach of the North Canal rides the main canal between certain points, and also delivers water to a certain number of water users. Usually they serve about 3,000 acres under each beat or ride.

Q. Was there a ditch rider responsible for the area of canal in this segment?

A. That is right.

Q. And his duties—would you just state briefly what he did along that line?

A. His duties were to ride this section of the North Canal from the intake of the Malheur Siphon up the canal to what is known as North Canal 33.1 lateral, which is some three miles above the break. He rides this ditch every day, seven days a week.

Q. And what are his instructions if he encounters anything which might appear to endanger the canal?

A. His instructions are to always watch for leaks and seeps and to report any of those seeps or leaks that he has seen himself or that have been reported to him by any of the farmers."

TR. 695

"Q. During the spring of 1946—was a ditch rider employed in the spring of 1946 along that segment of the canal?

A. Yes.

Q. Are the ditch riders required to submit reports to you of any evidence of seep?

A. The ditch riders report each day during the irrigation season. May I enlarge on this point? I would like to give a little detail.

Q. All right, go into that.

A. On the North Canal the ditch riders are called into the office at seven o'clock every morning and I personally talk to the ditch riders as to their rides of the previous day and their water requirements for the next day or two, and since I have been on this job I have personally called these men or they have called me every morning that the canal is in operation and water distributed to the farmers.

Q. How do you select these men?

A. Well, these men, we try to get qualified men, and preferably men that are farmers and understand farming.

Q. Are they acquainted with the area?

A. In most cases they are."

TR. 713-16

"Q. Now, you stated that in 1944 your attention was called to the seepage of water in the Hust place. That was brought to your attention by whom?

A. By the watermaster, Bert Adams. He was acting manager at that time.

Q. Did I understand in your examination of the canal after viewing that water on the Hust place you examined the canal about five hun-

dred feet upstream from a point opposite this water and four or five hundred feet downstream?

A. No, it about four hundred feet upstream and, oh, seven or eight hundred feet downstream, as I remember.

Q. You made that examination by going along afoot in the canal?

A. That is right.

Q. At that time did you also examine the Shaw place?

A. No. No, I did not.

Q. Did you ever go down onto the Shaw place and go over any part of that afoot looking for seepage?

A. No, I did not."

* * * (714)

"Q. When were you first informed of that?

A. Well, that is very noticeable from the canal bank.

Q. Will you please answer my question? When were you first informed of that leak?

A. That seep was called to my attention in the summer of '44.

Q. That has continued since that time?

A. Yes.

Q. Now, is it not a fact that that seep runs throughout at least a period of the year in the spring and fall when there's no water in the canal?

A. Possibly it does."

* * * (714-715)

"Q. When you went down the canal investigating the canal to find the source of the leak on the Hust place did you go as far north as to cover the section of the canal included in the break of 1946?

A. Yes, I would say I did.

Q. And at that time you knew of the leak or seepage in the coulee about four hundred feet north of the field shown in Exhibit 82?

A. That is right.

Q. As you examined the canal you found no evidences of leakage in the bottom of the canal?

A. I did not.

Q. You found no evidences of leakage in the outer bank of the canal?

A. This one leak that was there, yes.

Q. I mean in the canal itself?

A. No, nothing in the canal itself.

Q. Yet those leaks existed at that time? That is, there was water coming out of the toe of the outer bank at that time?

A. It showed in that ravine close to the toe.

Q. Yes. Then what investigation did you make, if any, to determine if that water was coming from any other source along the canal?

A. I made no further investigation.

Q. You made no investigation into the mountain side bank of the canal?

A. I did not.

Q. Now, as a matter of fact, about all the view or investigation you made of the Shaw place to determine whether any of that ground was seeped was as you rode along the top of the ditch bank in a car and observed it as you passed?

A. That is right.

Q. I believe you stated you went along there in the spring of 1946?

A. I did.

Q. And on that occasion, when you say you observed no evidence of seepage in the Shaw field, that was the time when you rode along the ditch bank in a car?

A. That is right."

TR. 68

The trial court stated in his opinion:

"There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break

because of the circumstances mentioned. The Court holds that the absence of ordinary care in this respect has not been demonstrated by this showing.

The next question is as to the competency of the inspection. It is not contended that there was no inspection. This, of course, would have been contrary to fact."

TR. 86-87

In holding the defendant liable in the two flooding cases, the court stated in his opinion:

"Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof. * * *

"The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. * * *

"The defendant, knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

TR. 760-61

Mr. Pettet, defendant's witness, testified:

“Q. Mr. Pettet, you say you checked the seep that comes up on the Hust place?

A. I check it occasionally.

Q. How long has that seep been running there?

A. Well, I am not sure, but I remember that has been running there for three or four years.

Q. Has it increased in volume?

A. I don't believe it has.

Q. And are you familiar with the seep that is just north of the north edge of the Shaw place, in that gulley?

A. Yes.

Q. How long has that seep been there?

A. Well, I have known of it three or four years anyway.

Q. In riding¹ the ditch, as you call it, you drive a car along the roadway on top of the ditch?

A. That is right.”

TR. 467

Mr. Newell, defendant's witness, testified:

“Q. And has the water been used in the canal for irrigation at all times since that time?

A. It has been used throughout the irrigation season ever since, except for this break and one previous break.

Q. Where was the previous break?

A. Oh, it was about thirty miles up the canal from the last break.

Q. Had there ever been any break of this canal from a point approximately 30 miles upstream from this break to and including its entire length downstream at any time since it has been serving this area, other than the break or breaks in question in this litigation?

A. Yes, sir, there was one minor break in so-called East Cow Hollow some time in the intervening period. I am not sure of the date.

Q. How long did that prevent people from receiving water downstream?

A. It is my recollection that the water was turned out on that occasion not more than two or three days.

Q. How far is Cow Hollow from this Mile Post 36?

A. I guess about 10 miles upstream."

TR. 484

Mr. Newell testified on cross-examination:

"Q. Now, these other breaks that counsel asked you about, where did they take place? There was one, you saw, at Cow Hollow that you remember very well, then one at a point about ten miles above the break that we are talking about.

A. I remember there was a break in Cow

Hollow and I was there before it was completed, but I am not sure just how long the water was out of the canal. (420)

Q. Are you familiar enough with that area to be able to say whether the canal followed about the same type of structure as it did down at mile post 36?

A. No; the canal where it broke in Cow Hollow was in deep cut.

Q. In a deep cut?

A. Yes.

Q. Now, what other breaks do you recall on which you can give me some idea as to the nature of the terrain that it was built over?

A. The 1940 break between the Owyhee River and Mitchell Butte was at a point where the canal was located around the end of a ridge, a rocky ridge.

Q. That would be somewhat like this Mile Post 36 break? Or would it?

A. No, it was a more dangerous looking situation, I considered, than this one."

TR. 485-87

Mr. Newell testified on cross-examination:

"Q. Now, do you recognize the fact that there might be danger in cross-cutting a porous stratum that would soak up water where there is no core wall of the nature that would cut that porous stratum off?

A. Wherever specially pervious stratum was encountered it should have attention.

* * * 486-87

“Q. * * * Well, assuming that your ditch and construction across the country intercepts a gravel bed, or a bed of porous structure that does get into the bedding of the ditch and under the ditch and up the inside bank and of such nature that water would seep into it, would that in your judgment, be a condition that should be remedied?

A. Yes, sir. * * *

Q. * * * I am referring to Exhibit 80. Suppose a condition actually exists as portrayed on there, would you say that that was such a condition that should have some special remedying? * * *

A. If there is a loose porous stratum located as the exhibit shows, then it should be corrected.”

TR. 125-29

Theodore Matherly, plaintiffs witness, testified:

“Q. Among other areas that you plowed, Mr. Matherly, did you plow on any land that laid up close to the ditch?

A. Well, not only that one field for Mr. Shaw.

Q. And where was the field that you actually did plow in relation to the bank of the ditch?

A. It was right under the ditch, kind of close

to that draw that runs down through there.

Q. Can you see that map that is nearest to you, Exhibit No. 82, that is on the billboard there? Does that drawing, in your mind, show about the location of the land under the ditch?

A. Yes, it does.

Q. Now, step over there and show to the Court about where you were plowing, Mr. Matherly.

A. This shows here the draw that the water rushed down (indicating).

Q. Yes.

A. Right in this area, right in here (indicating). We was plowing right down through this draw, like this, and my outfit was mired down right in there (indicating).

Q. Now, will you take this pencil and just mark the word 'plowing' at about the spot that you say that you were plowing in there?

A. Well, I don't know that I could get that right on the spot or not.

Q. Oh, no,—just as near as you can.

A. But I could get somewheres close, I think. (Witness here placed a mark on said exhibit).

Q. Will you put your initials after that 'T.' or 'T.M.' "

“Q. And what do you say, now, about whether you were able to plow on that or not?

A. No, we had to release on that. We couldn't plow it. We had to go around it.

Q. Why?

A. Too soft; couldn't go through it.”

* * * (128)

“Q. How much of that whole area delineated on that map—there is supposed to be 4.30 acres—how much of that would you say was too wet to farm there in March of 1945?

A. Well, I really couldn't answer that question. It seemed to be in spots. We would hit a soft spot and I would get stuck and we would pull around a little way and then we would hit another one. There seemed to be several of those spots, and where we would hit them we would just leave them.

Q. And how many spots would you say that you encountered there on that occasion that were too wet to plow?

A. Oh, four or five.”

TR. 138-39

Arthur C. Hawkins, plaintiffs witness, testified:

“Q. Were you there at any time before the break, so as to observe the nature of the soil around below the break?

A. Yes, I was there. I noticed—it was quite noticeable the alkaline formation all underneath the canal there.”

TR. 140-41

Hawkins testified further:

"Now, then, with that information (direction on the map) with that in mind, where is the area that you noticed as wet?

A. Well, this is the canal up here. (indicating). Immediately underneath this canal for, or, for quite an area here. (indicating)

Q. How close up to the bank of the canal?

A. Well, underneath the canal there is a lateral or feed ditch that runs down and runs south, and underneath that feed ditch is where it was wet. I happened to plow up there too, that same—in '46, I think it was. I had a crawler tractor and I plowed up there and I got stuck also."

And at TR. 142:

"Q. Do you remember whether or not the water was in the canal?

A. No, it hadn't been in the canal.

Q. It was before the irrigation season started?

A. Yes, that is right.

Q. And how wet was it in relation to whether you could plow or not?

A. Well, I had a crawler tractor and of course that wouldn't get stuck, but one wheel of my plow would get down so I would get stalled. It would hit the bottom of the furrow and drop down.

Q. Was it muddy?

A. Yes, it was very muddy.

Q. Were you able to plow some of that area or not in there?

A. I couldn't plow some of that next to the ditch. It was too muddy."

TR. 171-72

George Hust, plaintiffs witness, testified:

"A. —and I saw a little stream of water running down. Well, I stepped out of the ditch up on the bank and went on up and was going up the headgate—I presumed this water was coming from the headgate, and I got up a little ways and I saw my ditch dry again, so I stepped in the ditch and walked on up the ditch to the headgate."

* * *

"Q. Now, as I understand your testimony, there was part of that ditch that the water was flowing in and then you got above that water flow and the ditch was dry?

A. That is right.

Q. Could you tell where that water came from that was flowing in the ditch?

A. I couldn't tell exactly, no. I couldn't say where it was coming from. I could see where it came into the ditch but I couldn't see where it was coming from.

Q. And how far up the ditch from—Well,

take it the other way: How far down from the headgate was the ditch dry until you ran into this water flow?

A. About, I would say, three hundred yards.

Q. And then how much water was flowing in the ditch below where the water came into the ditch?

A. I wouldn't attempt to estimate it, but there was enough so that it was flowing."

TR. 187-89

Mr. John Turner, plaintiffs witness, testified:

"Q. Was there any of that area, John, that was wet, that you had difficulty in getting your machinery to operate on?

A. Yes. We was pitching hay, was in that particular field that particular day, and up here by this lateral we had the tractor that was coming on a slip, and we had horses drawing a slip, and as we got up here to the very top of this ditch,—

Q. Which ditch?

A. This here lateral,—As we got up close to it,—Of course, we had been in the field quite a little ways—we got the tractor stuck, and so my cousin, who was pitching with me, said 'We have got to get this tractor out,' and so as we were doing that we saw the water that was seeping in where the wheels spinned down.

Q. How far was that particular spot below the main canal, the Owyhee Canal?

A. I would say approximately 250 feet.

Q. From the main canal?

A. Yes.

Q. And how much of an area was so wet you couldn't operate a tractor?

A. Well, we couldn't see clearly, but, looking over it, we could estimate approximately an acre and a half.

Q. How far was the water from the surface of the ground?

A. The water wasn't on the surface of the ground, but we could see down where it was when the wheels cut down in the ground.

Q. How deep did your wheels cut in the ground?

A. I would say approximately five or six inches.

Q. And did the water rise in the tracks?

A. Yes.

Q. And how did you get the hay off?

A. Finally we had to pack this hay up here with pitchforks.

Q. Who was doing the cutting of the hay?

A. Ben Shaw cut the hay.

Q. And with what type of equipment?

A. He cut this hay with horse-drawn equipment.

Q. And how could you say whether he had any difficulty?

A. I could see where his horses had walked across and mired down in there."

TR. 200

Mr. Ben Shaw, plaintiffs witness, testified:

"Q. * * * Well, during '45 did you have any trouble harvesting that crop?

A. Some.

Q. And what was your trouble due to?

* * *

A. In binding across this particular place the bull wheel of the binder would slide.

Q. Was it wet?

A. It was wet."

TR. 201

"Q. * * * did you have any trouble in cutting that hay crop in '46, Ben?

A. I did.

* * *

Q. The first crop; and just what was your difficulty there?

A. Well, it was just too muddy to mow across. I did manage to wallow through it. I used horses.

Q. Was there water on the surface, or just immediately below the surface?

A. Well, just immediately below, you might say. Like I say, it would just come up in the horse tracks but never seemed to run off."

TR. 491

Mr. Newell, testified on cross-examination:

"Q. Now, if you had seen this condition as depicted even by these photographs, and had also considered water seeping from the bank on the lower side, do you think now that you would have checked on that and have done something to remedy that leaking condition?

A. If I had seen water seeping through the bank, or immediately at the toe of the bank, I would have directed that something be done.

Q. And you would have done that because you would have thought it would be necessary to preserve the ditch?

A. That is correct."

TR. 487-88

Mr. Newell, defendant's witness, testified on cross-examination:

"Q. Now, in your years of actual experience I presume you have seen ditches and canals, Mr. Newell, where water seeped out of the side and water rose at the toe of the canal and even springs came out? I presume you have seen that?

A. Yes, sir.

Q. What would that indicate to you as to the porosity of the canal banks or of the canal bed?

A. If seepage appears on the outside of the bank, then naturally the bank is pervious, and if it appears below the bank, above any farmer's own irrigation, then it would indicate that there was seepage under the bank.

Q. Now, take a canal that was built, say, in 1934, as this canal was built, and those indications of seepage are present for a number of years, that would lead you to think that water might be seeping through there that would naturally tend to weaken the stability of the canal itself?

A. If seepage had been present in the outside of the bank, then that is correct."

TR. 507

And at TR. 507 this witness testified:

"Q. All right, assume that water was coming out, rising to the surface, immediately under the toe of the ditch in an amount that ran into a perceptible stream, would that make any difference to you in your judging about the safety of the canal?

A. Immediately at the toe of the bank?

Q. Yes.

A. Yes, sir.

Q. It would?

A. That would."

TR. 579-81

Mr. Carter, defendant's witness, testified on cross-examination:

"Q. Now, this farmer's ditch on the Shaw place is just a short distance below the toe of the outer bank of the canal?

A. That is right.

Q. About how far, would you say, Mr. Carter?

* * *

A. I would say in some places it was 5 feet and in other places it was maybe 20 feet away. It didn't exactly follow the toe of the bank.

Q. Now, if it appears that it was testified in this case that at a time when the head was turned off, when this lateral was closed and no water coming from the canal into the ditch, there were at places in this farmer's ditch live or flowing water, where would you say that came from?

A. Well, I wouldn't know. Let me see if I understand you. No water, there hasn't been any irrigation in the farmer's ditch for some little time?

Q. Yes.

A. Water is out from the main canal?

Q. No, water is in the main canal.

A. Oh, water is in the main canal.

Q. But the headgate in this ditch is closed, so it is receiving no water from the regular source

of supply, and there is at places in this ditch live or flowing water. Where would you say that came from?

A. Well, the logical conclusion would be that it was coming from the canal bank—can't attribute it to any other source, under those conditions that you described.

Q. Yes, and if that continued over a period of time it would indicate a continuous seepage from the canal?

A. Yes, sir, under the conditions you have stated it would."

TR. 419-21

James W. Bouton :

"Q. In your experience as an engineer, and particularly such experience as you have had in designing projects, would it be good engineering or sound and safe construction, in a hillside such as the North Canal, to build the lower side of a canal over a pervious structure without a core wall which would tend to cut off the seepage from the head ditch? * * * (420)

A. It would not be good engineering practice to build a canal through a pervious piece of earth without some consideration to the fact that it was pervious, and some sort of preventative should have been put in that canal at that time, either a core wall or lining the entire canal, bottom and both sides.

Q. Assuming that there was no core wall there and the ditch was not lined on either side prior to the break, would you say, under the conditions that you found, that that was good construction? * * * (421)

A. No, it was not."

TR. 467-68

Testimony of R. J. Newell:

Q. And has the water been used in the canal for irrigation at all times since that time?

A. It has been used throughout the irrigation season ever since, except for this break and one previous break.

Q. Where was the previous break?

A. Oh, it was about thirty miles up the canal from the last break.

Q. Had there ever been any break of this canal from a point approximately 30 miles upstream from this break to and including its entire length downstream at any time since it has been serving this area, other than the break or breaks in question in this litigation?

A. Yes, sir, there was one minor break in so-called East Cow Hollow some time in the intervening period. I am not sure of the date.

Q. How long did that prevent people from receiving water downstream?

A. It is my recollection that the water was turned out on that occasion not more than two or three days.

Q. How far is Cow Hollow from this Mile Post 36?

A. I guess about 10 miles upstream.

Q. Would you describe the structure of this

North Canal at the point of the break, that is, the construction?

A. The location of the canal at the point of the break was along the lower part of the sidehill. It was at a point where a small part of the outside bank was in fill and required a core bank, and it was located rather deep in the sidehill, so that the outside bank was very heavy."

TR. 525

Oscar G. Boden testified in answer to plaintiff's counsel's question:

"A. * * * It also shows, by means of a dotted line here, the position of a core bank wherever needed, and the specification provide that where that is build it shall have a height, a minimum height, of a foot above the designed water depth, and a minimum top width of 8 feet. * * * "

(530-532)

Q. * * * Now, then, in just plain English language, so it will be indicated, how far do the field notes show a core bank in connection with the actual repairs that were made in both the first and second breaks in this case, upstream and downstream?

A. Well, if we go away back here to the page preceeding, it shows 600 or more feet, and it goes back in number, in distance, and the break was at 1906 plus 25, and it shows core bank proceeding on the lower side of the canal—here at this Station 1912 plus 25, some 600 feet beyond the point at which the canal broke.

Q. In which direction?

A. Downstream.

Q. Downstream. What does it show upstream?

A. Well, I stop at 600 feet. It continues on back for a considerable distance. On the downstream end there it shows that we ran into a heavier cut there at about 600 feet, but there wouldn't be any core bank there, and some distance it starts in again. * * *

Q. But, in any event, as I understand your testimony, the core bank that was constructed was for the entire length of this particular repair that was made, is that correct?

A. Oh, yes, some distance each side, continuous."

and at page 539-41:

"Q. Now, when were these field notes made, then, in relation to the time of construction?

A. Before construction. They would have to be, because they show the excavation limits and the depth." * * *

and at pages 541-43 Mr. Boden on cross-examination:

Q. Mr. Boden, did you finally check this exhibit you were testifying from to determine the exact yards you had in the core wall?

A. The notes show there that in that 50 feet, according to the calculations, there was 3 cubic yards.

Q. Three cubic yards?

A. Yes, sir.

Q. Now, that would over be an area 50 feet long and how wide? What is the base of your core?

A. That one section there, the base is about 3.8 feet, and the other 3.6.

Q. That is, in width?

A. Yes, sir. * * *

Q. Now, the purpose of the core wall is placing in the bank a stratum of impervious material so the water could not soak through? That is the purpose?

A. That is basically the purpose, yes."

TR. 427

James W. Bouton testified:

Q. During the construction,—How could the canal have been built so that the break could have been avoided?

A. They could have put in the same core wall that they put in there after the break occurred, if that core wall was down far enough below the pervious material, or it could have been lined.

Q. Either method, in your judgment, would have prevented the break?

A. Either would have prevented the break, I think. * * * (429)

A. I think the same condition existed there that existed in the other point, that would be my opinion, and that the core wall was not carried far enough down the stream to prevent another break."

TR. 488

Mr. Newell:

“Q. Well, assuming or taking into consideration the fact that this ditch, right in the middle of the irrigation season, without any additional water in the ditch for pressure, no storms or earthquakes or anything, went out, wouldn't that indicate to you that that ditch was pretty wet?

A. That there was a weakness somewhere, yes, sir.”

No. 12689

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for the Ninth Circuit**

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v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON**

BRIEF FOR THE APPELLEE

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FILED



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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the district court holding in favor of the United States in the consolidated cases involving the failure to deliver water (R. 56-89) is reported in 93 F. Supp. 779.

JURISDICTION

This is an appeal from judgments (R. 98) entered June 22, 1950, in favor of the United States, dismissing on the merits the complaints of the appellants in the consolidated cases, of which the above-entitled cause was selected as a representative action. Notices of appeal were filed August 21, 1950. The jurisdic-

tion of the district court was invoked by appellants under the Federal Tort Claims Act (then cited as 28 U. S. C. 931 (a)), since reenacted and codified as 28 U. S. C. 1346 (b) and 28 U. S. C. 1402 (b). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

By an order the trial court consolidated for trial 191 failure-to-deliver-water cases of which the case of *Sheff White, et al. v. United States* was selected as being representative (R. 89). Fifty-one of the original 191 cases were consolidated on appeal to this Court and the case of *Sheff White, et al., v. United States* was selected as representative of those 51 cases (R. 793).

STATUTE INVOLVED

SEC. 1346. United States as defendant—

* * * * *

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

QUESTIONS PRESENTED

Where the trial court found no negligence on the part of the United States after a thorough trial of the facts, a careful reexamination of those facts as disclosed in the record, having heard the witnesses, testing their credibility by extensive questioning, and after a thorough on-the-ground investigation:

1. Whether on appeal this Court will reverse the trial court's findings of facts and conclusions of law and judgment which completely exonerate the United States of any charge of negligence.

2. Whether on appeal this Court will reverse the trial court's findings of facts, conclusions of law and judgment which held and specifically found that the evidence failed to establish that the proximate cause of appellants' alleged damage was any negligent act or omission on the part of the United States.

3. Whether on appeal this Court will reverse the trial court which held that the evidence did not establish any negligent act or omission on the part of the United States, when the sole basis for invoking jurisdiction was the allegation of negligence which was not proved.

4. Whether on appeal this Court will reverse the trial court when the trial court found affirmatively that the United States had exercised reasonable care.

5. Whether on appeal this Court will reverse the trial court when appellants having failed to prove negligence, now try to assert their rights are in contract, although they brought their actions under the Federal Tort Claims Act.

6. Whether on appeal this Court will reverse the trial court where the appellants had no contract for water with the United States and thus had no privity with it.

7. Whether on appeal this Court will reverse the trial court where the only contract which the United States had for the delivery of water specifically waived any liability on the part of the United States for the failure to supply water, the only grounds upon which these cases are predicated.

PRELIMINARY STATEMENT

For clarification purposes certain salient factors are emphasized:

1. The case of *Sheff White, et al., v. United States* is a representative case of 191 cases consolidated for trial under the Federal Tort Claims Act. The sole question involved in those cases was whether there was negligence on the part of the United States in failing to deliver water for purposes of irrigation for a period commencing July 14, 1946, to July 31, 1946. Two flooding cases are in no way involved in these cases. At the time of the preparation of this brief, judgments have not been entered in those two flooding cases.

2. Judgment on the merits was entered in favor of the United States in the 191 failure-to-deliver-water cases after a thorough trial of the facts and an on-the-ground investigation by the trial court. That court found that the evidence did not establish negligence on the part of the United States.

3. Of the 191 cases involving the failure to deliver water, appeals have been taken in but 51. As in the cases consolidated for trial, the case of *Sheff White, et al., v. United States* has been selected as a representative case on appeal.

4. Erroneous statements are made by appellants throughout their opening brief. Those errors constitute grievous departures from the facts as actually before the trial court. Fearing that those incorrect and garbled statements would mislead this Court, special treatment of them in this brief of the United States has been necessary. The most serious of these erroneous statements have been separately stated and designated Errors No. 1 through No. 8. At the appropriate points in the statement of facts in this brief, references are made to appellants' incorrect statements. Included in each statement respecting the errors is documentation from the record revealing the true statement of facts.

5. Reference is likewise made to the appendix made a part of appellants' brief. By stripping from the context the testimony of many of the witnesses the true facts have been frequently distorted. One method calculated to create a wrong impression of the evidence upon which the trial court found favorably for the United States, which has been used by appellants, is to select statements made by witnesses in answer to hypothetical questions having no relationship to the facts as they actually existed. To counter the method of stripping from the context certain testimony would entail a virtually complete restatement of the record.

As that needless task would be of no benefit to this Court it is respectfully requested to ignore the appendix to appellants' opening brief and look to the entire record. That record will reveal an abundance of substantial evidence from creditable witnesses to support the judgment of the trial court favoring the United States.

STATEMENT

Pursuant to its policy of making habitable large areas of the public domain in the Western States, the United States of America undertook the construction of the Owyhee Reclamation Project. That construction was in accordance with the Reclamation Act of June 17, 1902¹ as supplemented and amended. All of the lands of the appellant water users are within the Owyhee Reclamation Project. Those lands are arid and agriculture may not be successfully prosecuted on them without artificial irrigation.

To secure the repayment of the costs of the Owyhee Reclamation Project the United States, in conformity with the reclamation laws, entered into contracts with the irrigation districts comprising the Owyhee Reclamation Project.² There are no contracts for a supply of water between the United States and the appellants who brought suit against the United States. The appellants, however, have contracts with the irrigation districts.

¹ 32 Stat. 388.

² Findings of Fact Nos. 3 and 8, R. 90, 94; Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 57.

By their contracts the irrigation districts contracting with the United States specifically covenanted that the United States would not be liable for any damages from shortages of water "on account of drought, inaccuracy in distribution, or other causes."³ That waiver of liability for any damage for water shortages was confirmed and consented to by the appellants in their contracts with the irrigation districts.⁴ Moreover, those contracts containing the express waiver of liability for any damage for water shortages, confirmed and consented to by appellants, were affirmed by the court of the State of Oregon having competent jurisdiction.⁵

One of the major structures of the Owyhee Reclamation Project is the north canal. That canal, commencing at the dam at Owyhee Reservoir, extends for a distance of 70 miles. Thousands of acres of arid lands are irrigated by the waters delivered to them by the north canal. The proviso in the contracts waiving liability for any damages on the part of the United States for shortages of water applies to the north canal. Construction of the north canal was accomplished in full conformity with the plans and specifications for the structure.⁶ It was likewise built in accordance with the general practice of the

³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

⁴ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58.

⁵ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58.

⁶ R. 527, Testimony Oscar G. Boden; R. 475, Testimony R. J. Newell.

area. At the points here involved the width of the structure was a minimum of 14 feet at the crown or top of the lower bank.⁷ The depth of the canal was 10 feet 8 inches, the depth of the water being 6 feet, and the canal bank being 4 feet 8 inches above the water level. At the points in question the water was carried in cut as distinguished from filled-in earth,⁸ or as otherwise described, the water at those points in the canal was carried in virgin soil.⁹ When-

**ERROR NO. 1: ERRONEOUS STATEMENT IN APPELLANTS'
OPENING BRIEF**

Pages 55 (2), 68, 69, 70, 82, 97. Throughout their brief appellants assert the north canal was not constructed in conformity with the plans and specifications. That is incorrect as disclosed by the testimony of Mr. Newell and Mr. Boden, the two engineers in charge of constructing the north canal. Their testimony stood unchallenged except for the incorrect and unsupported statements of appellants in their brief. See footnote immediately preceding. Equally incorrect is the assertion that the plans and specifications called for a core wall in the bank of the canal. There is no basis for that assertion. The plans and specifications called for a core bank which was in fact constructed. (R. 531, Testimony Oscar G. Boden.) Moreover, adoption of plans are discretionary acts specifically exempt from Tort Claims Act. (28 U. S. C. 2680 (a); see 56 Yale Law Journal 534, 544, 545.)

⁷ R. 525-535, Testimony Oscar G. Boden.

⁸ R. 534, Testimony Oscar G. Boden; R. 672, Testimony Grant Gordon.

⁹ R. 697, Testimony James Spofford.

**ERROR NO. 2: ERRONEOUS STATEMENT IN APPELLANTS'
OPENING BRIEF**

Pages 5, 81. Misleading statements by appellants are made throughout their brief that the canal was partly in fill; that is, built up over the normal ground level. It will be observed the water in the canal was all carried in natural earth with a minimum bank at the crest of 14 feet in width. Appellants' principal expert witness Merritt testified that the method used in

ever in the construction of the north canal porous or unstable earth or material was encountered it was removed. It was then replaced by fine select material which was compacted.¹⁰ Construction was completed and water was first turned into the north canal in

constructing the north canal "follows the general practice." To the express question, "In other words, this is the general practice of constructing canals in the area?" that witness answered, "Yes, sir, I think so." (R. 358, Testimony Allen C. Merritt.)

¹⁰ R. 534, Testimony Oscar G. Boden; R. 474, Testimony R. J. Newell.

ERROR NO. 3: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 36, 41, 56 (6), 61 (A), 95. On the cited pages the incorrect statement is variously made by the appellants that the north canal was constructed over a porous area and was incapable of retaining water. That manifest misstatement is disproved by the evidence of the witnesses Boden and Newell who were in charge of construction of the north canal and whose testimony stands unrefuted and unchallenged in the record. Boden and Newell each testified that wherever porous material was encountered it was removed and replaced by fine select material. The fact that the north canal has been in constant use since 1935 evidences the impropriety of the declarations that the structure has been built upon and over porous material, incapable of carrying water. Moreover, as held by Judge Fee, the use of the canal for a period of eleven years resulted in it building up a protective covering within the canal. (R. 65, second paragraph, Opinion March 13, 1950, of James Alger Fee, Chief Judge; Findings of Fact Nos. 10-18, R. 95-97.) Not only is the statement that the north canal was built over porous material incapable of holding water contrary to the findings of the court, but it does violence to one's credulity, for, as stated by the man who constructed the canal, "if there had been a very porous stratum, water would have entered and found its way through in much less time than the somewhere twelve years that the canal operated successfully * * *." (R. 536-537, Testimony Oscar G. Boden.)

the fall of 1935.¹¹ For eleven years to the dates here important, the north canal was utilized to bring water for irrigation purposes to the appellants. During those years the canal had built up a "protective covering."¹²

Well removed from the bank and toe of the north canal were alleged "wet spots" or seep areas attributed by the appellants to the canal. However, the trial court stated it was not convinced that those "wet spots" "did not come from surface water," adding that "Experience in the irrigation country does not indicate that such circumstances would be taken as indications that a break was going to occur in the main [north] canal."¹³ " * * * At a great distance from the canal"¹⁴ were flowing springs. Those "springs were well known to the whole countryside, and if anyone had believed that they were a source of peril [to the north canal] the matter would have been taken up in protest by the landowners on whose property these appeared and other irrigators who depended on the canal for their crops."¹⁵ Had those owners and irrigators thought the "wet spots," seep areas, or springs imperiled the north canal "the fact * * * would have been

¹¹ R. 466, Testimony R. J. Newell.

¹² Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

¹³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66-67.

¹⁴ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

¹⁵ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

reported to the Government and we would have had testimony that such warnings were given. There is no such testimony in the record.”¹⁶

On Sunday, July 14, 1946, at the height of the irrigation season, the north canal was twice patrolled and the customary inspection for its protection was made.¹⁷ Those two investigations disclosed nothing which would presage that the north canal would fail. Nevertheless, within a half hour after the last in-

¹⁶ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67-68.

¹⁷ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

ERROR NO. 4: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 6. Appellants erroneously assert throughout their brief that there were seep areas “immediately adjacent to the outer and lower bank of the canal”; that “obvious leaks or seeps developed in lands adjacent to the canal”; that “water soaked condition developed * * * immediately under the toe of the canal bank”; that the “land could not be plowed, nor the crops harvested by ordinary means.” Categorically denied by the United States was the evidence in regard to the “wet spots” or seepage adjacent to or near the canal. As stated, the canal was patrolled twice a day. Though seepage first turns crops yellow then kills them (R. 589, 590, Testimony George N. Carter), appellants adduced evidence of harvesting the crops from the fields in question. In addition, those crops which were viewed twice daily evidenced no seepage. Equally important, though the owners of the fields were well acquainted with the ditch rider, they did not bring the alleged seepage to the attention of the ditch rider, his superior, or any official of the United States. (R. 758-760, Testimony Otto S. Pettet; R. 696, Testimony James Spofford). Judge Fee, referring to the evidence in regard to seepage, stated that it was weak and that the water alluded to by appellants was “surface water or rain.” (Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.)

spection, and without warning, a breach occurred in the structure approximately 36 miles from the headworks, virtually the same distance from the terminus of the canal. No one observed the first break.

“The record shows that those engaged in fixing the first break took prompt and efficient methods to rebuild the canal at the point where the break had taken place.”¹⁸ Moreover, the “evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard * * *.”¹⁹ On Thursday, July 18, 1946, by reason of the “prompt and efficient” methods pursued by the United States the engineer in charge was able to order water turned

¹⁸ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

¹⁹ Finding of Fact No. 16, R. 96; See R. 630-632, Testimony Grant Gordon.

ERROR NO. 5: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 55 (4), 67 and generally throughout the brief. One of the most grievous and patently incorrect statements is appellants' repeated allegations that there was a total lack of inspection of the area in which the break in the north canal occurred. That statement is contrary to the court's express finding set out above, to the court's declaration in its opinion, likewise set forth above, and contrary to the express testimony of witnesses of both the appellants and the United States. (See comments above and documentation; R. 739, 741, Testimony Wiley A. Clowers; R. 239, Testimony Hubert F. Terhune; R. 605-607, 669, Testimony Grant Gordon, engineer in charge of repair.)

into the north canal.²⁰ Very briefly after the water had been released into the north canal it overtopped the bank.²¹ After the brief overtopping the water

²⁰ Finding of Fact No. 9, R. 94.

²¹ R. 274-277, Testimony Hubert F. Terhune; R. 608, 609, Testimony Grant Gordon.

ERROR NO. 6: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 6, 7, 65 and throughout appellants' brief. Appellants seek to in some manner relate the brief overtopping of the north canal subsequent to the time the repair was made, with the second break which occurred downstream from the first. That occurrence had no relationship with the second break. There was no causal connection established between the alleged damage to the appellants and the overtopping. As appellants' witness testified in regard to the matter in question: "I didn't connect the overflow as a break. I just termed that as an overflow." (R. 277, Testimony Hubert F. Terhune.) For a full and complete and unrefuted description of the overtopping, reference is made to R. 608, 609, Testimony Grant Gordon.

ERROR NO. 7: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 6, 7, 65, 66, 67, 97 (4), (5). Another of appellants' often-repeated erroneous statements relates to the alleged condition of the north canal when water was released into it. There was no causal connection between the condition of the repair and the second break. As stated by the trial court, the repair was made by "prompt and efficient methods." (R. 69, Opinion March 13, 1950, of James Alger Fee, Chief Judge.) More important, the repair at the time the water was released into the canal was "a reasonably even grade, yes, perhaps a reasonably grade, across the top * * * Both at the downstream and the upstream ends. * * * the general contour of the grade was on a fairly even grade and, due to the topping of the water, did not appear to be not to exceed three or four inches lower on the downstream end, as the water was a little heavier on the downstream end by perhaps three and not to exceed four inches." (R. 252, 253, appellants' witness,

receded in the north canal and flowed normally for some period of time.²²

Here then are the facts thoroughly tried and found by the presiding judge: (1) the north canal is a large structure 70 miles in length delivering water to irrigate and make productive thousands of acres of arid lands; (2) it was constructed by eminently competent engineers; (3) its construction conformed with the practice long adhered to in the area in which it was located; (4) for eleven years it was successfully operated; (5) twice daily it was patrolled and inspected—"inspection" which declared the court "was unquestionably adequate"; (6) yet at a point on the canal thought safe by those who were responsible for it, within a half hour subsequent to its last inspection, wholly without warning the structure failed—no one observed the failure so rapidly did it occur; (7) thereafter the north canal was repaired by "prompt and efficient methods."

Hubert F. Terhune.) More important, the second break did not occur at the point of the repair, it occurred some distance downstream. In fact, the repair subsequent to the first break, as emphasized by appellants' own witness, was "intact, with the exception of a little bit of new stuff on top, which you can't compact, which would probably amount to two or three or four inches on top that was gone, but as far as the end, I presume it was reasonably close to the end that we had left on." (R. 265, Testimony Hubert F. Terhune; see also R. 753, Testimony Wiley A. Clowers.) Moreover, at the point of the repair the canal was not several feet below the normal grade as appellants assert. (R. 645, Testimony Grant Gordon.)

²² R. 611, Testimony Grant Gordon.

There follows a factual résumé of the “phenomenon” to which the trial court attributes the occurrences giving rise to appellants’ claims against the United States. Verbatim excerpts of the testimony of Grant Gordon who enjoys outstanding eminence as an engineer, lends clarity to this phase of the consideration: “The overtopping stopped. * * * Water was passing down the canal without difficulty * * * I was standing on the downstream end of the patch watching the action both of the tractor and the water, when I heard * * * an unusual noise, turned my flashlight into the canal and noticed a vortex some three feet in diameter which had formed directly opposite from where I was standing. * * * I turned my flashlight outside of the canal to see where the water was going, noticed a heavy discharge of water from a tubular hole, I would call it, which appeared to be about two to two and a half feet diameter * * *. No portion of the water which was involved in the flow came over the top of the bank. There was no overtopping of the bank. * * * the material through which the blowup occurred was completely downstream and completely separate from any material that we had placed, the original patch.”²³ At that time it was 1:30 a. m., the morning of the 19th of July. The water emanated from a hole in the bank—an emanation which took place in the natural earth of the hitherto dry canal bank, far removed from the seep concerning which

²³ R. 611, 612, 613, Testimony Grant Gordon.

appellants failed to establish any causal relation with the canal failure.²⁴

To be emphasized is the fact that the second break and the first break were entirely separate. The second breach left intact the repair made in connection with the first break. As stated, the trial court found that the United States "took prompt and efficient methods to rebuild" the canal after the first break. Likewise declared by the trial court was the fact that, "At

²⁴ R. 754, Testimony Wiley A. Clowers; see Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

ERROR NO. 8: ERRONEOUS STATEMENT IN APPELLANTS' OPENING BRIEF

Pages 5, 7 and throughout brief. Repeatedly appellants incorrectly state that the two breaks in the canal were immediately adjoining or that the broken portions joined each other. Those statements are incorrect. The breaks which occurred were in separate and distinct parts of the canal, the second break occurring downstream from the first. (Finding of Fact No. 9, R. 94; Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58, 59.) Appellants' witness, Hubert F. Terhune, R. 263, testified as follows: "Q. Where was that hole with respect to the hole that had been washed through by the first break? A. It possibly, from the first break, possibly would have been 75 feet from the first break to the second break. * * * A. Yes, I would say that there was possibly 75 feet between the two holes." Thus appellants' own witness refutes appellants' contention that the two breaks were together. Appellants' Exhibit 82, showing two distinct washes widely separated in the area through which the water from the breaks cut their courses, reveals likewise the erroneous allegations by appellants that the two breaks occurred at the same place and were immediately adjoining. As revealed above, the repair of the first break remained entirely intact after the second break had occurred, thus disclosing that there were two separate and distinct breaks occurring in separate and distinct parts of the canal. (R. 613, Testimony Grant Gordon; R. 753, Testimony, Wiley A. Clowers.)

that time, no one knew of the weaknesses of the structure or what caused the difficulty.” Continuing, the trial court stated, “It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered.”²⁵ A careful examination of the facts is warranted respecting the phenomenon to which the court refers. For those facts explain how a structure of the nature of the north canal would fail without previous warning. That phenomenon was a defect in a stratum of earth situated some four feet beneath the floor of the north canal at the point of the break.²⁶ To locate the defect it was essential to make extensive excavation with heavy equipment.²⁷ The layer itself was some three or four feet thick and in making the second repair it was essential to remove earth to a depth of upward to eight feet.²⁸ Actual cause of the failure came about by reason of the collapse of this hidden stratum, “it lost its homogeneity, it broke down structurally.”²⁹ Having located the defective stratum which had caused the difficulty the United States proceeded expeditiously to repair the second break. By July 31, 1946, the north canal was being operated at full capacity.³⁰

During the period from July 14, 1946, to July 31, 1946, water failed to reach the lands of the appellants

²⁵ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

²⁶ R. 614-615, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

²⁷ R. 620, Testimony Grant Gordon.

²⁸ R. 620, Testimony Grant Gordon.

²⁹ R. 618, Testimony Grant Gordon.

³⁰ Finding of Fact No. 9, R. 94.

and other water users situated below the breach in the north canal. Suits were instituted against the United States, pursuant to its waiver of sovereign immunity respecting tort actions,³¹ by 191 of those water users including appellants. Their claims were based upon the alleged failure to deliver water by reason of the failure of the north canal. Simply stated, the sole charge against the United States was that water did not reach their lands. No trespass, no flooding, no seepage, no encroachment upon their lands is charged in these cases against the United States, nor was there any involved. Two flooding cases involving wholly different principles of law were likewise brought against the United States. As yet in the flooding cases no findings of fact, conclusions of law or judgments have been entered. Trial of the failure-to-deliver-water cases followed the entry of a comprehensive pre-trial order which delineated the scope of the proceedings and established the course which those proceedings were to take. The actual trial of the issues commenced June 9, 1948, and concluded June 17, 1948. Highly important is the fact that the trial court made a thorough on-the-ground investigation of the north canal, the area served by that structure, and viewed the terrain in which it was located. On March 13, 1950, the court filed its opinion holding in favor of the United States. Subsequently, after extensive conferences with counsel for the appellants and for the United States, there was entered on June 22, 1950,

³¹ 28 U. S. C. 1346 (2).

findings of fact, conclusions of law and judgment for the United States. That judgment, denying the relief prayed by the appellants and dismissing their complaints, was on the merits. It is that judgment which the appellants now seek to have reversed by this Court. No objections were filed by the appellants to the findings of fact upon which the judgment for the United States is premised.

ARGUMENT

I

The evidence does not establish that the proximate cause of plaintiff(s)' [appellants'] alleged damage was caused by any negligent act or omission on the part of the defendant [United States] ³²

That declaration by the trial court constitutes a complete exoneration of any liability on the part of the United States respecting the claims of appellants now before this Court. There follows a review of the specific findings of the trial court and the abundance of substantial evidence in support of them. It is respectfully submitted, they preclude a reversal of the judgment on the merits in favor of the United States as here prayed by the appellants. At the outset of this phase of the matter reference is first made to the applicable rules of court and decisions which govern under the circumstances presented.

* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the wit-

³² Conclusion of Law No. 3, R. 97.

nesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.³³

That principle enunciated in the preceding quotation accords with the rule prevailing at the time of the adoption of the Rules of Civil Procedure, with the then prevailing equity practice.³⁴ This Court, adhering to the principle set forth above, succinctly and in terms precisely in point respecting this case, declared:

“The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.”³⁵

Affirming this Court’s opinion, the Supreme Court of the United States, quoting from an earlier decision, stated: “It is our duty to accept a finding of

³³ Amendments to Rules of Civil Procedure for the District Courts of the United States, Rule 52 (a).

³⁴ H. R. Document No. 588, 75th Congress, 3d session, notes to the Rules of Civil Procedure.

³⁵ *Butte & Superior Copper Co. v. Clark-Montana Realty Co. et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

fact, unless clearly and manifestly wrong.”³⁶ Findings of fact entered by the trial court and its opinion on every factor involved in the cases sustain the judgment entered by the trial court. Each finding of fact, each holding in the opinion are sustained by an abundance of substantial evidence. Few issues of fact were tried more carefully by a court. There are few instances in which a trial court has scrutinized more carefully the facts involved or made a more thorough on-the-ground investigation. Findings were made by the court upon each of the salient factors—construction, inspection, operation and maintenance, investigation prior to repair, repair, and the fact that at no time did the United States have knowledge which would cause it to anticipate that the north canal would fail in the areas in which it did. On each of the propositions the United States exercised the care which the law imposes upon it under the circumstances—in each instance the trial court held in favor of the position taken by the United States.³⁷

(a) Construction

Undisputed testimony by witnesses of the appellants and the United States established beyond question that the north canal was constructed in accordance with the established practice of the area.³⁸ Appellants’ principal expert declared that the north

³⁶ *Butte & Superior Copper Co. v. Clark-Montana Realty Co., et al.*, 249 U.S. 12, 30 (1918).

³⁷ Findings of Fact and Conclusions of Law, R. 89-97.

³⁸ R. 464, Testimony R. J. Newell; R. 766-767, Testimony Henry L. Seanger.

canal was constructed in conformity with the general practice of the area.³⁹ Eleven years of use of the canal, stated that expert of appellants, evidenced the reasonableness of the methods used by the United States in constructing the north canal.⁴⁰ Observed in passing are the erroneous and confused statements by appellants to the effect that the United States had failed to comply with the plans and specifications for constructing the north canal. Similarly erroneous statements are made relating to the requirements for the construction of a core bank or core wall. That matter has been completely reviewed in Error No. 1, *supra*, page 8. There it is pointed out that the plans and specifications for the north canal called for a core bank which was constructed. They did not require the construction of a core wall. By the documentation in that Error there is refuted the groundless assertion of appellants on the subject.

Confronted with specific findings of the trial court against them on all phases of the case, the appellants seek to represent to this Court that the north canal was constructed over loose or porous material incapable of holding water. Unrefuted testimony dissipates that erroneous statement. Common sense dictates that a canal the size of the north canal could not conceivably have stood for eleven years over a foundation of loose, porous material. Judge Fee who made an on-the-ground investigation tested with searching questions the witness in charge of construct-

³⁹ R. 358, Testimony Allen C. Merritt.

⁴⁰ R. 376, Testimony Allen C. Merritt.

ing the north canal. He questioned specifically as to the methods pursued and precautions taken when so-called porous material was encountered in the canal. Judge Fee elicited this testimony from the witness on the subject: “* * * wherever we struck a so-called porous stratum, or what we thought was so, we dug it out and put selected fine material in.” Continuing, that same witness stated: “* * * it is inconceivable to me that, with the number of employees, including myself, making constant inspection of the work, that we would have overlooked any place that appeared to be a so-called porous stratum. If we had seen it we would have overdug and filled in.” That same witness who constructed the canal, made this terse and complete answer to the question of what would have resulted had the canal been constructed over a porous area: “* * * if there had been a very porous stratum water would have entered and found its way through [the canal] in much less time than the somewhere twelve years that the canal operated successfully before this break occurred.”⁴¹

Moreover, appellants' own witness lays bare the manifestly incorrect statements of appellants made throughout their brief that the north canal was constructed over porous material incapable of holding water.⁴² Judge Fee's holding was justified that eleven years of use of this canal would lead persons charged with only the duty of ordinary care to believe that

⁴¹ R. 534 et seq., 536-537, Testimony Oscar G. Boden.

⁴² Appellants' Opening Brief, p. 95 (2); R. 358, 376, Testimony Allen C. Merritt.

the "construction was proper * * *." ⁴³ Judge Fee was likewise justified beyond question in finding that the appellants failed to prove that the United States did not "exercise reasonable care at all times * * * in the construction * * * of the north canal." ⁴⁴ Not only did the trial court make that finding but, as stated, expressly held that the evidence does not establish that the proximate cause of the alleged damage "was caused by any negligent act or omission on the part of the defendant [United States]." ⁴⁵ Consequently, there is no basis for departing from the principle as enunciated by this Court that under the circumstances here presented those findings are "conclusive upon this appeal." ⁴⁶

(b) Inspection

Incredibly inaccurate statements are made in appellants' brief respecting the construction of the north canal. Those inaccuracies are refuted by the trial court's findings and the evidence upon which they were predicated. Equally inaccurate statements are made in that brief in regard to the inspection and the means of inspection adopted by the United States to preserve the north canal. ⁴⁷ Respecting the inspection of the north canal the trial court declared: "It

⁴³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

⁴⁴ Findings of Fact Nos. 13, 18, R. 95, 96.

⁴⁵ Conclusion of Law No. 3, R. 97.

⁴⁶ *Butte & Superior Copper Co. v. Clark-Montana Realty Co., et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

⁴⁷ See Error No. 5: Erroneous Statement in Appellants' Opening Brief, set forth *supra*, p. 12.

is not contended that there was no inspection. This, of course, would have been contrary to fact. There was positive evidence that inspection was carried on regularly twice a day, and that within one-half hour of the break the inspector passed over the road on the bank of the canal and saw nothing which would lead him to believe that a break was imminent. This is shown to have been the usual custom of the Government in regard to inspection. It was unquestionably adequate to fulfill the duty of exercise of ordinary care.”⁴⁸ That statement by Judge Fee in his opinion was in complete accord with the findings of fact and conclusions of law which he has entered and upon which judgment for the United States was predicated. The trial court held specifically that the United States had met the duty incumbent upon it in its inspection of the north canal.⁴⁹

Twice daily the north canal was patrolled by a ditch rider who had been so employed for twenty years. For nine years he had patrolled the particular segment of the canal that failed. That ditch rider had, a half hour before the breach took place, investigated the area which failed and, as the trial court states, found nothing “which would lead him to believe that a break was imminent.”⁵⁰ Moreover, the engineer in charge of the north canal had in the

⁴⁸ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

⁴⁹ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69; Findings of Fact Nos. 14, 18, Conclusions of Law, R. 95, 96, 97.

⁵⁰ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68; R. 757-760 Testimony Otto S. Pettet.

fall of 1945 immediately preceding the failure, made a thorough investigation of the area of the canal here in question. That investigation revealed no weakness in the structure, rather the structure was lined with "good tight silt."⁵¹ Those facts stand unchallenged and unrefuted in the record. Appellants' attacks on the competence of those who made the investigations are baseless. They offered no evidence that those investigations were not sufficient or that those who performed the investigations were not qualified. To allude again to the trial court's opinion: "It might be contended that the inspector employed was not competent, but there has been no attack upon that basis. * * * In view of the nature of the duties, however, the Court determines that the inspection made was sufficient."⁵²

Manifestly, therefore, the trial court was correct in holding in regard to inspection, as set forth above, that: "Therefore, as far as the inspection is concerned, the Court holds that it met the duty incumbent upon the Government * * *."⁵³ Under the circumstances, therefore, it is respectfully submitted there is no basis in law upon which the trial court's findings may be reversed upon appeal.

(c) Operation and maintenance

"The Court believes the operation of the canal at full head at a time when everyone was crying for

⁵¹ R. 692, 693, Testimony James Spofford.

⁵² Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

⁵³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

water was in the exercise of ordinary care.”⁵⁴ Thus the trial court, having emphasized the long period of operations of the north canal, defeats at their inception the attacks of appellants upon the method of operating the north canal. Specifically, the trial court found: “Respecting both the first and second breaks of the north canal the plaintiff(s) [appellants] failed to prove that the defendant [United States] did not use reasonable care in the * * * maintenance, [and] operation” of the north canal.⁵⁵ Repeatedly the appellants make reference to the presence of seepage in the area in question. Yet, as will be subsequently emphasized, appellants fail to cite a single authority to the effect that seepage in failure-to-deliver-water cases is any evidence of negligence. More important, however, is the fact that: “It is a matter of common knowledge that drainage goes hand in hand with irrigation and is a concomitant part of such operation.”⁵⁶ An equally authoritative statement recognizing that seepage is the normal and usual result of irrigation is as follows: “It has been held that it is the general rule of large ditches that seepage usually exists from their headgate along down their line * * *. All irrigation canals must of necessity seep more or less * * *.”⁵⁷ Appellants’ own expert witness readily admitted on direct examination that seepage is prevalent in the system owned

⁵⁴ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

⁵⁵ Finding of Fact No. 18, R. 96, 97.

⁵⁶ *Kaylor v. Recla*, 160 Ore. 254, 84 P. 2d 495, 497 (1938).

⁵⁷ Wiel, *Water Rights in the Western States*, 3d ed., vol. 1, sec. 488, pp. 526, 527.

and operated by the irrigation district which employs him. This excerpt from the testimony bears out that proposition:

Q. And what is the nature of the problems that you have to meet in the King Hill Project?

A. Similar to that condition that exists right there.

Q. Did the King Hill people have a lot of leakage in their project for some time?

A. They have had a lot and do have at the present time.⁵⁸

Thus the evidence adduced by appellants' own witness discloses that seepage is a usual occurrence when structures of the nature here under consideration are involved. Certainly the presence of seepage does not presage failure in a canal. For, as stated by Judge Fee: "The opinion of the experts seems to accord the experience of the irrigation country that the suspiration of a canal is apt to denote a healthy condition." ⁵⁹

In regard to the trial court's last statement and its specific finding that there was a failure to prove that the United States had not properly operated and maintained the canal, particular references to the record are fully warranted. Accordingly, this Court's attention is invited to the careful analysis of Judge Fee respecting the presence of seepage as disclosed in the record.⁶⁰ Similarly, reference is made to ex-

⁵⁸ R. 412, Testimony of James W. Bouton.

⁵⁹ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 67.

⁶⁰ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66, 67.

pert testimony in the record regarding seepage and the fact that its presence does not presage a canal failure, but rather, as the trial court states, denotes a healthy condition.⁶¹ Repeated erroneous statements of the appellants may not change that fact.

Correct beyond question, therefore, are the findings of the trial court in regard to the operation and maintenance of the north canal by the United States. On appeal, it is respectfully submitted, those findings should not be reversed.

(d) Investigation prior to repair

“The record shows that those engaged in fixing the first break took prompt and efficient methods to rebuild the canal at the point where the break had taken place.”⁶² That statement in the opinion comports fully with the specific finding of the trial court as follows: “The evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; and that at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break.”⁶³ Extended comment is not required to eliminate from

⁶¹ R. 777-781, Testimony Henry L. Senger; R. 412, Testimony James W. Bouton (witness for appellants); R. 506-509, Testimony R. J. Newell.

⁶² Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

⁶³ Finding of Fact No. 16, R. 96.

consideration the baseless contention of appellants that there was a lack of inspection to ascertain the cause of the first break. In that regard reference is made to Error No. 5, *supra*.⁶⁴ There it will be observed that witnesses for both the appellants and the United States testified that there was in fact a thorough investigation prior to the time the repair was made. Suffice to say there was a thorough investigation, the court so found on an abundance of substantial evidence from creditable witnesses and on that evidence exonerated the United States of appellants' charges of negligence. For reasons previously discussed there should be no reversal on appeal of the express findings of Judge Fee that "at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; * * *." ⁶⁵

(e) Repair

Alluded to previously was the trial court's statement that the United States took "prompt and efficient methods to rebuild * * * the north canal." Specifically, in regard to the matter, the trial court found: "The evidence established that the defendant [United States], acting in an emergency, took prompt and efficient methods to rebuild and repair the north canal subsequent to the first break, and reasonable care was exercised to determine the cause of said

⁶⁴ *Supra*, page No. 12.

⁶⁵ Finding of Fact No. 16, R. 96.

break, and the work of repair of the break was done and completed promptly, with reasonable care and in a good workmanlike manner.”⁶⁶ A more conclusive finding on the subject is difficult to perceive. Appellants have sought to convey the inference that the first and second failures of the north canal were at the same point or at points immediately adjoining. That is incorrect. As previously discussed, the breaks involved separate areas of the canal. For a full review of the facts relating to the separate breaks in the canal please refer to Error No. 8, *supra*.⁶⁷ Similarly the appellants aver that the repair was not completed at the time the water was turned into the segment and that too large a head of water was released at that time resulting in the second break. That statement is likewise refuted by testimony diametrically opposed to the contention. In that regard, please consider Error No. 7, *supra*.⁶⁸ Each of the groundless assertions of appellants respecting the method of repair, condition of the canal, and release of water into the canal, are refuted by the one salient fact—the first repair after the second break was intact. That fact was testified to by witnesses for the appellants,⁶⁹ and for the United States.⁷⁰ On appeal, therefore, there is no basis for reversing the trial court’s finding that the United States in making

⁶⁶ Finding of Fact No. 15, R. 96.

⁶⁷ Page 16, *supra*.

⁶⁸ Page 13, *supra*.

⁶⁹ R. 265, Testimony Hubert F. Terhune.

⁷⁰ R. 753, Testimony Wiley A. Clowers.

the repair acted promptly, efficiently, with reasonable care and "in a good workmanlike manner."⁷¹

(f) At no time had the United States knowledge that would cause it to anticipate that the north canal would fail in the areas in which it did

From the findings of fact exonerating the United States from fault the conclusion of the trial court necessarily followed that: "The evidence does not establish that the proximate cause of plaintiff(s)' [appellants'] alleged damage was caused by any negligent act or omission on the part of the defendant [United States]."⁷² Consequently, judgment on the merits for the United States was the logical sequitur and, as emphasized, that judgment was entered. There is an additional factor of importance, however, which, due to the repeated incorrect statements of appellants respecting the cause of the failure of the north canal, warrants brief review. That factor relates to knowledge of the cause of the breaks. On the subject the court found: "The defendant [United States], based on its knowledge of the construction, operation, and maintenance of the canal under its system of inspection, was not bound to anticipate the breaks

* * *. "⁷³ Appellants, in seeking to have reversed Judge Fee's express finding that there was no evidence which would cause the United States to antic-

⁷¹ Finding of Fact No. 15, R. 96.

⁷² Conclusion of Law No. 3, R. 97.

⁷³ Finding of Fact No. 14, R. 95.

ipate the failure of the north canal, refer to two previous breaks.⁷⁴ Those two breaks were very minor in character and situated 10 and 30 miles respectively from the occurrences here involved. Two minor breaks in over 11 years of operation in a structure 70 miles in length at points 10 and 30 miles from the segment that failed demonstrates conclusively the integrity with which the north canal was constructed. That fact renders ridiculous the repeated assertions of appellants that the north canal was constructed over "loose and porous material" incapable of holding water.

Likewise found by the trial court was the fact that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."⁷⁵ Moreover, the court found that: "The evidence adduced by defendant [United States] established that subsequent to the second break, there was discovered situated beneath the floor of the canal a weak stratum of earth

⁷⁴ Appellants' Opening Brief, p. 84. As the method of presentation in the appendix of appellants' opening brief may be misleading to the Court, it is respectfully requested that the Court consider the entire record on the matter—R. 467, 468, 484, 485. Thus, as indicated, over a period of eleven years, there were only two very minor, widely separated breaches in this structure which is 70 miles in length.

⁷⁵ Finding of Fact No. 16, R. 96.

formation.”⁷⁶ Alluding to that unknown stratum situated far below the floor of the canal, against which the United States could not guard, the trial court stated: “At that time [when repair of the first break was made], no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered.”⁷⁷ Those findings quoted above are premised upon an abundance of substantial testimony by creditable witnesses.⁷⁸ Appellants do not deny that there is evidence to support the findings—to do so would be a departure from actuality. They, like the appellants in the decision of this Court cited earlier,⁷⁹ simply state that they disagree with the court’s appraisal of the evidence. To have reversed the express findings of fact there must be a demonstration that the trial court was clearly in error. Even the incorrect statements upon which appellants principally rely fall far short of proving that Judge Fee was clearly in error in his findings. For, as repeated, every finding of the court is supported by substantial evidence from creditable witnesses and there is no basis in law for reversal on appeal.

The authorities cited by appellants in attacking the trial court’s findings are not in point. In view

⁷⁶ Finding of Fact No. 17, R. 96; R. 614, 615, 618, 620, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

⁷⁷ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

⁷⁸ Please refer to statement of facts, *supra*, page 17.

⁷⁹ *Butte & Superior Copper Co. v. Clark-Montana Realty Co., et al.*, 248 Fed. 609, 616 (C. A. 9, 1918).

of the thorough on-the-ground investigation, the careful examination of the testimony, and the substantial evidence of creditable witnesses, there is manifestly no basis for asserting the findings of the trial court are "clearly erroneous."⁸⁰ The citation of authorities to the effect that findings may be reversed respecting testimony which is "all one way, and is not immaterial, irrelevant, improbable * * *" or which is uncontradicted or unimpeached has no bearing here.⁸¹ To assert that those authorities are applicable in this case where the trial court has made findings in favor of the United States on every facet simply discloses weakness on appellants' part. Such obviously baseless assertions respecting the applicability of those authorities must be relegated to the same status as the baseless assertion that the north canal was constructed over loose, porous material "incapable of holding water." Statements of that character respecting a structure 70 miles in length which for 11 years served the Owyhee Reclamation Project, which was at the time it was viewed by the trial court, and, as this Court will no doubt take judicial notice, is still serving that area, casts doubt on all statements made in appellants' brief. Worthy of note in conclusion is the fact that the expert testimony relied upon by the appellants to reverse the trial court's findings was elicited from witnesses who had not seen the north canal until two years subsequent to the time the canal had been restored to

⁸⁰ See Appellants' Opening Brief, p. 98.

⁸¹ See Appellants' Opening Brief, pp. 99-100.

full operation.⁸² The trial judge made his on-the-ground investigation at approximately the same time as those “experts” made their investigation upon which they premised their conclusions to purely hypothetical questions. Thus Judge Fee who presided, had ample opportunity in the course of the trial to weigh the credibility of appellants’ witnesses and those of the United States. Judge Fee rejected the conclusions of the witnesses of appellants and sustained those of the United States. Consonant with the repeated declarations of the highest Court of the United States, these authoritative statements have been made: “The question of credibility of witnesses and the weight to be given their testimony is exclusively within the province of the trial court; the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion.”⁸³ “In the review of a judgment of the trial court based upon findings made by that court, all reasonable presumptions are to be indulged in favor of the correctness of the findings. Testimony in the record which tends to support them must be accepted as true and must be viewed most favorably to the conclusions or findings of the court below. The appellate court must indulge the strongest inference in favor of the finding that the evidence will reasonably warrant, deeming every material fact established which the evidence tends to prove.”⁸⁴

⁸² R. 292, Testimony Allen C. Merritt; R. 413, Testimony James W. Bouton.

⁸³ 3 Am. Jur., Appeal and Error, sec. 896, pp. 458-459.

⁸⁴ 3 Am. Jur., Appeal and Error, sec. 897, pp. 461-462.

Confronted with findings of fact squarely against them, appellants attack the opinion of the trial court and those findings.⁸⁵ They do not offer references to the record to sustain their attack. They do, however, allude to testimony of the witnesses of the United States regarding the deeply embedded stratum which caused the difficulty. Omitted from their assertions though is the fact that the stratum in question was not known to the United States until after the second break.⁸⁶ In attacking the statements of the trial court that seepage does not evidence weakness in the structure, appellants refer to testimony of witnesses for the United States. Appellants state that those witnesses testified that the presence of seepage is a cause for alarm. At no time did the witnesses in question make such statements. To the contrary, they testified that seepage of the character involved was usual and did not evidence weakness.⁸⁷ The selected excerpts of testimony which appellants set forth in no way support their conclusions. What appellants have done is to cite hypothetical questions raised on cross-examination and seek to represent to this Court that those were the facts of the case. The questions, it will be observed, were premised upon "assumptions." Assumptions of fact that were not proved and did not exist. Similarly, on the pages in question, the appellants refer to a reservoir in the canal bank.

⁸⁵ Appellants' Opening Brief, pp. 100-106.

⁸⁶ Finding of Fact No. 16, R. 96; see R. 618-620, Testimony Grant Gordon; R. 571, Testimony George N. Carter.

⁸⁷ R. 506, Testimony R. J. Newell; R. 581, Testimony George N. Carter; R. 412, Testimony James W. Bouton.

There was no proof of a reservoir in the canal bank. In fact, appellants' own witness refused to state that there was a reservoir in the bank.⁸⁸ To contend that a reservoir existed in the canal bank is as absurd as the contention of appellants that the north canal was constructed over loose porous material incapable of holding water. That contention respecting a canal which down through the years has served and continues to serve thousands of irrigated acres simply shows desperation on the part of the appellants who have failed to prove negligence but seek by any means available to have reversed the trial court.

Again, seeking to represent a situation which did not exist, appellants state that in the first repair porous structures were encountered. That is incorrect. All the earth was removed to where the remainder was "so hard and firm we could not move it."⁸⁹ Appellants having nothing to sustain their incorrect statement, cite their Exhibit 80. That exhibit was prepared, two years after the repair was made and the canal had been in operation for that period, by a witness who had never seen the canal prior to that time. That witness could not know the situation as it existed and the exhibit was pure conjecture.⁹⁰ The inability of appellants' witnesses to defend the conjectures upon which that Exhibit 80 was premised was disclosed in cross-examination. As the trial court commented in denying a motion to strike that

⁸⁸ R. 360, Testimony Allen C. Merritt.

⁸⁹ R. 740, Testimony Wiley A. Clowers; see Error No. 5 *supra*, page 12.

⁹⁰ R. 114, 117, Testimony Paul Bronken.

indefensible Exhibit 80: "Oh, denied. He is trying to prove a thesis. As he says, it is for diagrammatic purposes and to illustrate his theory. * * * As to whether I agree with that theory or not is a different matter."⁹¹ The disposition of the case by the trial court reveals that the theory was rejected.

Reference has already been made to appellants' incorrect statements respecting core walls to which they again allude. In that regard see Error No. 1 *supra*, page 8.

Appellants seize upon the trial court's statements that had anyone in the area thought that the north canal was imperiled they would have given warning. The record shows no such warning was given. Attacking Judge Fee's observation, appellants carefully avoid reference to the fact that the canal was patrolled twice daily and had been most thoroughly investigated for any sign of weakness. Thus the trial court was eminently correct in holding that the United States fulfilled the duty respecting investigation which was incumbent upon it. Equally correct is the finding by the trial court that the situation which existed was not such as would cause a reasonable man to anticipate that the canal was in danger.⁹² Like other attacks upon the trial court, the one in question is without merit.

Finally, appellants attack the trial court for declaring the fact that the north canal had been success-

⁹¹ R. 373, 374, Comments by Judge Fee; Testimony Allen C. Merritt appellants' chief expert.

⁹² Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68, 69; Finding of Fact No. 16, R. 96.

fully operated for eleven years evidenced that it was properly constructed. Ignored by appellants is the fact that their own expert witness testified that the north canal was constructed in accordance with the practice adhered to in the area. Likewise ignored is the testimony by that same witness of appellants that the fact the canal had been operated for eleven years evidenced that the methods used in construction were reasonable under the circumstances.⁹³ Moreover, the trial court not only found that there was no negligence in construction, it likewise found that there was no evidence of negligence in regard to inspection, operation and maintenance, investigation prior to repair, and repair. Finally the trial court found the United States had no knowledge which would cause it to anticipate the failure of the north canal. Each of those findings is separately reviewed above. Each, as revealed, is supported by substantial evidence from creditable witnesses. Those findings cover every aspect of the case and exonerate completely the United States of any charge of negligence. Here the trial court heard the testimony, made an on-the-ground investigation and had the opportunity to test the credibility of the witnesses. As recently stated by the Supreme Court of the United States: "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. * * * The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The

⁹³ R. 358, 376, Testimony Allen C. Merritt.

District Court heard the witnesses, and was the proper judge of their credibility.”⁹⁴ Clearly the findings are correct and should not be reversed on appeal.

II

As the evidence did not establish that the proximate cause of the damage was caused by any negligent act or omission on the part of the United States, the trial court properly entered judgment for the United States

The findings of the trial court and the evidence upon which they were premised exonerated the United States from liability to the appellants. The evidence did not establish that the proximate cause of the alleged damage was any negligent act of the United States. Thus appellants are precluded from recovery. That conclusion is based upon the tenet of the law that: “No action for negligence can be maintained unless the breach of duty has been the cause of the damage. * * * Causal relation—the connection of cause and effect—must be established.”⁹⁵ “Causal connection in law, as the term is applied relative to negligence and resultant injury, has long been referred to as the rule of proximate cause.”⁹⁶ As succinctly stated by the Supreme Court of the State of Oregon: “Proof of negligence alone does not give rise to a cause of action, but the negligence com-

⁹⁴ *Walling v. General Industries Co.*, 330 U. S. 545, 550 (1946); see also *Warren v. Keep*, 155 U. S. 265 (1894); *Furrer v. Ferris*, 145 U. S. 132 (1892); *Tilghman v. Proctor*, 125 U. S. 136 (1888).

⁹⁵ *Shearman and Redfield on Negligence*, rev. ed., vol. 1, sec. 33, p. 91.

⁹⁶ *Shearman and Redfield on Negligence*, rev. ed., vol. 1, sec. 34, p. 92.

plained of must have been the cause of the injury.”⁹⁷ In full recognition of the general rule enunciated above, the Supreme Court of the United States commented: “The negligence complained of must be the cause of the injury.”⁹⁸ To re-emphasize: “* * * before an act of negligence can be said to be the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of such act of negligence.”⁹⁹

As appellants failed to establish that any act or omission on the part of the United States was the proximate cause of their alleged damage they are precluded from recovery under the precepts of the law of negligence just reviewed. Though a great deal of appellants’ evidence related to the presence of seepage, they failed entirely in any way to establish a causal relationship between that seepage and the failure of the north canal. To the direct question of the trial court as to whether the seepage on the Hust place, on which appellants place great reliance,¹⁰⁰ had “anything to do with this situation [the break in the canal]?” appellants’ expert responded “Well, there is a possibility.”¹⁰¹ Likewise responding to the inquiry by the trial court as to the source of the spring on the Hust place, the same witness responded, “Well, I couldn’t tell. It is a spring and evidently comes from

⁹⁷ *Cosgrave v. Tracey*, 156 Ore. 1, 13, 64 P. 2d 1321 (1937).

⁹⁸ *A. T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 354 (1929).

⁹⁹ *Shearman and Redfield on Negligence*, rev. ed., vol. 1, sec. 35, p. 94.

¹⁰⁰ Appellants’ Opening Brief, pp. 5, 80, 81, 86.

¹⁰¹ R. 407, Testimony, Allen C. Merritt.

the formation.”¹⁰² Certainly the replies to the court to these direct and pertinent questions in regard to the causal relation between the break and the seepage in question brought forth equivocal responses. Clearly the witness does not assert, nor is there grounds for asserting, that the seepage on the Hust place had any causal relation with the break. Further, to have evidentiary value the witness is required to testify that the seepage on the Hust place “probably” had causal connection with the break rather than the statement that there was a “possibility” of some relationship between the break and the seepage on the Hust farm. That statement is premised on the well-established principle that: “An expert’s opinion must be in terms of the certain or probable, and not of the possible.”¹⁰³ This view has been adopted in many recent cases.¹⁰⁴ A correlative proposition is the firmly established tenet of the law that: “One is not responsible for consequences which are merely possible, but only for those which are probable * * *.”¹⁰⁵ That is clearly the rule in the State of Oregon.¹⁰⁶ By reason of the general acceptance of the fundamental principle which has been stated, further citation of authority on the proposition is unnecessary.

¹⁰² R. 406, Testimony, Allen C. Merritt.

¹⁰³ 20 Am. Jur., Evidence, sec. 795.

¹⁰⁴ *Perkins v. Nashua Mfg. Co.*, 91 N. H. 211, 16 Atl. 2d 700 (1940); 1947 Pocket Supplement Wigmore on Evidence, vol. 7, sec. 1976. See also comments on use of term “possibility” by expert witness, *Butte & Superior Copper Co. v. Clark-Montana Realty Co., et al.*, 248 Fed. 609, 617 (C. A. 9, 1918), affirmed 249 U. S. 12.

¹⁰⁵ Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 94, sec. 35.

¹⁰⁶ *Aune v. Oregon Trunk Co.*, 151 Ore. 622, 51 P. 2d 663 (1935).

Appellants failed entirely to establish any causal connection between the other seepage concerning which they adduced evidence and the failure of the north canal. Thus it has no relevance here. For, as stated, "Causal relation—the connection of cause and effect—must be established."¹⁰⁷ Moreover, "Merely to show a connection between the negligence and the injury is not sufficient to establish liability for negligence. The connection must be such that the law will regard the negligent act as the proximate cause of the injury."¹⁰⁸ Proximate cause has been defined as follows: "The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."¹⁰⁹ Assuming solely for purposes of discussion that the alleged seepage existed and the seepage constituted negligence, plaintiffs have nevertheless failed to establish actionable negligence against the United States. They adduced no evidence that the seepage caused the north canal to fail. Having failed to establish causal connection between the seepage concerning which appellants adduced evidence and the break in the north canal, that evidence, it is repeated, is irrelevant.

Here it is essential to allude to the many cases cited by appellants to support their contention that the trial court erred in entering judgment for the United

¹⁰⁷ Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 33, p. 91.

¹⁰⁸ 38 Am. Jur., Negligence, sec. 27.

¹⁰⁹ 38 Am. Jur., Negligence, sec. 50.

States.¹¹⁰ Every case and authority cited by appellants involved alleged injury by reason of seepage or overflow. Those authorities are not in point. These are not seepage or overflow cases. Here there is no encroachment of water, no trespass, no intrusion of water upon the lands of appellants. These are cases where damage is claimed by reason of the alleged failure to deliver water. Seepage would be relevant only if it were the proximate cause of the failure of the north canal. It was not and the court specifically held that the evidence did not disclose negligence on the part of the United States. Efforts of appellants to rely upon those authorities simply disclose the lack of any authorities to support their contention that the trial court should be reversed. Further comment is unnecessary. Appellants failed to establish that negligence on the part of the United States was the proximate cause of their alleged damage. Having thus failed, the trial court, premised upon the cited authorities, properly entered judgment for the United States.

III

As the United States had no knowledge of the cause of the failure of the north canal it may not be charged with negligence

The trial court specifically found that: "The defendant [United States], based on its knowledge of the construction, operation, and maintenance of the canal under its system of inspection, was not bound to anticipate the breaks"¹¹¹ in the north canal. More-

¹¹⁰ Appellants' Opening Brief, pages 36-41.

¹¹¹ Finding of Fact No. 14, R. 95.

over, the trial court found that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."¹¹² It was on the basis of the facts upon which those specific findings were made that Judge Fee in his opinion declared: "At that time [when the first break occurred], no one knew of the weaknesses of the structure or what caused the difficulty. It was only after the second break that the phenomenon, which unquestionably caused both breaks, was discovered."¹¹³ There was no knowledge on the part of the United States that would cause concern over the integrity of the north canal.¹¹⁴ Appellants offered no proof that the United States had knowledge. Rather, in an effort to overcome their failure to prove knowledge, appellants declare (1) the United States had actual notice of a dangerous condition;¹¹⁵ (2) the United States was bound to anticipate the

¹¹² Finding of Fact No. 16, R. 96.

¹¹³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69. Respecting the lack of knowledge on the part of the United States as to the cause of the failures of the north canal please refer to the discussion above under the heading of, "At No Time Had the United States Knowledge that would cause it to Anticipate That the North Canal would fail in the Areas in which it did," at page 32 of this brief. There will be found full documentation of the evidence upon which the findings of the trial court on the subject are premised.

¹¹⁴ Please refer to comments and documentation under the heading of "Inspection" at page 24 of this brief.

¹¹⁵ Appellants' Opening Brief, pp. 80-83.

break.¹¹⁶ Findings of the trial court premised on an abundance of substantial evidence from creditable witnesses dispose of the contention numbered (1).¹¹⁷ Those findings and the documentation refute entirely the contention of actual knowledge or notice which was the equivalent of knowledge. Equally clear is the fact that the United States was not bound to anticipate the breaks. To repeat, the trial court found: "The evidence established * * * that at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and that defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."¹¹⁸ In most lucid terms the trial court points out that the presence of seepage along the canal was well known to the whole countryside and had anyone believed, especially those dependent upon the canal, that it evidenced damage to the structure, the matter would have been reported to the United States. The warning, had there been one, would have been in the record. Yet, states the trial court: "There is no such testimony in the record. There was nothing then in any of these conditions which would require a person, in the exercise of ordinary care, to anticipate a break because of the

¹¹⁶ Appellants' Opening Brief, pp. 84-93.

¹¹⁷ Please refer to comments and documentation under the headings "Inspection" at page 24 of this brief; "Operation and Maintenance" at page 26 of this brief; "At No Time Had the United States Knowledge that would cause it to Anticipate that the North Canal would fail in the Areas in which it did," at page 32 of this brief.

¹¹⁸ Finding of Fact No. 16, R. 96.

circumstances mentioned.”¹¹⁹ Witnesses for the United States testified they had no knowledge, no warning, that a break was imminent. As emphasized, the canal was twice patrolled on the day of its failure and within a half hour of when the break occurred.¹²⁰ That testimony stands in the record unfuted and unchallenged. Manifestly, therefore, the trial court did not err in finding as it did that the United States was without knowledge as to the cause of the first break, and did not know of anything that would cause it to anticipate the occurrence of the second break. For reasons previously reviewed those findings of the trial court should not be reversed on appeal. Accordingly, those findings declaring that the United States had no knowledge of the first break or information which would cause it to anticipate the second break exonerate the United States of any charge of negligence. Lack of knowledge of the factors giving rise to the occurrences upon which appellants predicate their claims precludes recovery in negligence. That principle was well stated in these terms by the Supreme Court of the State of Oregon in a recent decision: “A man cannot be held responsible on the theory of negligence for an injury from the act or omission on his part unless it appears that he had knowledge or reasonably was charged with knowledge that the act or omission involved damage

¹¹⁹ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

¹²⁰ R. 759, Testimony Otto S. Pettet; R. 696, Testimony James Spofford. See also statement and documentation on page 11 of this brief.

to another.”¹²¹ That sound principle has virtually universal recognition. It is a principle grounded on sound logic. It is inherent in the law of negligence, for as stated: “Fundamentally, the duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing; opportunity by the exercise of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury.”¹²²

It is, therefore, reiterated that the appellants have failed completely to prove knowledge on the part of the United States of the cause of either the first or second breaks and they have thus failed to prove negligence against the United States and relief was properly denied them by the trial court.

IV

The burden of proof was on the appellants to establish that the United States was negligent, and they have failed to do so—the doctrine of *res ipsa loquitur* has no application to cases like these involving the failure to deliver water

“Since the burden of proof lay on plaintiffs [appellants] to establish cause and damage as a proximate result, no liability can be found in this state of the record. In view of the nature of the duty to deliver water, *res ipsa loquitur* does not apply.”¹²³

¹²¹ *Belknap v. Klaumann*, 181 Ore. 1, 178, P. 2d 154, 155 (1947).

¹²² 38 Am. Jur., Negligence, sec. 23.

¹²³ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 65.

Judge Fee, by that declaration, recognized the true character of the claims of appellants. Simply stated, these appellants sued the United States because water did not reach their headgates. Here there was no encroachment upon their lands, no flooding, no seepage or trespass. Their sole complaint is that they did not receive water for a short period of time when they desired it. Manifestly, under the circumstances, the trial court was correct in holding that the principle of *res ipsa loquitur* should not apply. Appellants are unable to cite a failure-to-deliver-water case where the doctrine of *res ipsa loquitur* has been followed. Highly significant is the fact that the seepage cases cited by appellants required proof of negligence.¹²⁴ From one of the cases heavily relied upon by appellants,¹²⁵ the court declared:

“The construction of ditches is one of the customary and recognized methods of appropriating water, and conveying the same for use in irrigation and for other necessary purposes. It is the method more generally, and indeed, almost universally, employed. While those engaged in such an undertaking, attended with possible risks to others, should be answerable for the conduct thereof with diligence proportioned to the apparent risk, there is no substantial reason, we think, for holding them accountable as insurers, nor for injuries not attributable to some fault or negligence on their part.”

¹²⁴ Appellants' Opening Brief, pp. 36-41.

¹²⁵ Appellants' Opening Brief, p. 39, citing *Howell v. Big Horn Basin Colonization Co.*, 14 Wyo. 14, 81 Pac. 785, 790.

Again from one of the seepage cases cited by appellants, this statement is taken: "If, in the actual operation of a canal, sudden and unexpected damage results by reason of some hidden defect which could not reasonably have been foreseen, the owner would not be liable in damages, because he is not an insurer, but chargeable only in case of negligence."¹²⁶ This Court, in regard to flooding cases, specifically declared: "Liability for damage is not to be assumed without proof of some fault or negligence on the part of the defendants."¹²⁷

In regard to liability for damages from the failure of an irrigation canal this succinct and highly important statement has been authoritatively made regarding the rule in the arid West: "The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Negligence must be shown. It is not even a case of *res ipsa loquitur* and negligence is not presumed from the mere fact that a break or escape occurred. The ordinary rule of negligence, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances, applies."¹²⁸ Thus, the doctrine of *res ipsa loquitur* has been rejected in seepage and in flooding cases in the West. It necessarily follows, therefore,

¹²⁶ Appellants' Opening Brief, p. 36; *Tormey v. Anderson-Cottonwood Irr. Dist.*, 53 Cal. App. 559, 200 Pac. 814, 816 (1921).

¹²⁷ *Eikland, et al., v. Casey, et al.*, 290 Fed. 880, 882 (C. A. 9, 1923).

¹²⁸ *Wiel on Water Rights in the Western States*, 3d ed., vol. 1, sec. 461, p. 489; see also *Jacoby v. Gillette*, 174 P. 2d 505 (1946); 169 A. L. R. 502, 510.

that the doctrine would not be adhered to in cases such as these where the sole charge is that water was not delivered. Uniformly the cases, such as these, involving the failure to deliver water have required the proof of negligence. They have applied the ordinary rule of negligence that there must be a failure to use the care which an ordinary prudent man would have used under the circumstances.¹²⁹ The court, having reviewed certain instructions given by the lower court, quoted with favor the following excerpt: "It was the defendant's duty to use reasonable care and diligence in maintaining its canal and keeping it supplied with water, * * *." ¹³⁰ That principle has been adhered to in other jurisdictions in the West where irrigation is essential to successful agricultural operations.¹³¹ An examination of the authorities respecting the alleged failure to deliver water in regard to irrigation districts indicates that the same degree of care is required of them as is required of ditch companies.¹³²

Efforts of appellants to force an analogy between these cases involving the failure to deliver water and the cases cited involving death by high voltage wires, railroad accidents, flooding and similar cases simply

¹²⁹ *Rayborn v. Salmon River Canal Co.*, 50 Idaho 297, 295 Pac. 1001, 1003 (1931).

¹³⁰ *Hyink v. Low Line Irr. Co.*, 62 Mont. 401, 205 Pac. 236, 238 (1922).

¹³¹ *Burtenshaw v. Bountiful Irr. Co.*, 90 Utah 196, 61 P. 2d 312 (1936). See also *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 Pac. 619 (1915); L. R. A. 1915 D.

¹³² *Six v. Bridgeport Irr. Dist.*, 105 Neb. 254, 179 N. W. 1014 (1920); See cases 69 A. L. R. 1238; 160 A. L. R. 1179.

reveal the dearth of authority to support their contention that the doctrine of *res ipsa loquitur* should be applied in cases involving only the question of failure to deliver water. Appellants, failing to prove their case, seek to have this Court declare that one who operates a ditch in the arid West is an insurer that water will be delivered. That doctrine, as revealed above, has been consistently rejected by the courts.

To be noted in passing is the well established doctrine that "The *res ipsa loquitur* rule does not apply where it appears that the accident was due to a cause beyond the control of the defendant, such as the presence of *vis major* * * *. Nor does it apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible." ¹³³

Assuming solely for purposes of argument that the doctrine of *res ipsa loquitur* applies to failure-to-deliver-water cases, it is apparent that the facts adduced by the United States relieve it of liability. That statement is predicated on the declaration by the trial court that the cause of the failure of the north canal was a stratum situated far below the floor of the canal concerning which the United States had no knowledge. On the subject the trial court stated it was that structure unknown to the United States "which unquestionably caused both breaks." ¹³⁴

¹³³ 38 Am. Jur., Negligence, sec. 303, p. 1000.

¹³⁴ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 69.

Premised on the preceding review of facts and law, Judge Fee was correct beyond question in declaring that the doctrine of *res ipsa loquitur* should not apply when, as here, the claim is premised upon the failure of water to be delivered. Thus the burden of proof was on the appellants to prove negligence. For as authoritatively stated: "In an action founded upon negligence, the burden of proof, of course, rests upon the plaintiff. He must make out his case by a fair preponderance of evidence."¹³⁵ Continuing, the cited authority makes this statement which, as will be observed, is extremely pertinent: "It is certainly the duty of plaintiff to prove affirmatively that the defendant has been negligent. He must also prove facts from which it can fairly be inferred that the defendant's negligence was the cause, and the proximate cause, of the injury. Mere surmise or conjecture, on any of these points, will not do."¹³⁶ Those principles apply to the cases here under consideration.

Appellants, having failed to prove negligence, the trial court found that: "Respecting both the first and second breaks of the north canal the plaintiff(s) [appellants] failed to prove that the defendant [United States] did not use reasonable care in the construction, maintenance, operation, inspection, or repair of said canal."¹³⁷ It likewise found that: "The

¹³⁵ Shearman & Redfield on Negligence, rev. ed., vol. 1, sec. 52, p. 136.

¹³⁶ Shearman & Redfield on Negligence, rev. ed., vol. 1, sec. 52, p. 137.

¹³⁷ Finding of Fact No. 18, R. 96.

burden of proof lay on plaintiff(s) [appellants]
 * * *.¹³⁸ “The evidence does not establish that
 the proximate cause of plaintiff(s)’ [appellants’] al-
 leged damage was caused by any negligent act or
 omission on the part of the defendant [United
 States].”¹³⁹ “Plaintiff(s) [appellants] have failed
 to establish that the defendant [United States] did
 not exercise reasonable care in the construction, oper-
 ation, maintenance, repair, or inspection of the north
 canal at all times in controversy.”¹⁴⁰ Having failed
 to sustain their burden of proving that the United
 States was negligent, it is respectfully submitted,
 precludes reversal on appeal.

V

The United States fulfilled the duty incumbent upon it to exercise ordinary care in the construction, inspection, operation, and maintenance, investigation prior to repair, repair of the north canal, and all other aspects

These are failure-to-deliver-water cases. As stated, they differ fundamentally from flooding or seepage cases where the complainants’ lands are encroached upon by water. Thus seepage is relevant only if it was the proximate cause of the breach of the north canal. Elements involving construction, maintenance, operation or repair have significance only if they have causal connection with the failure of the water to reach the laterals of the appellants. Beyond question, the burden of proof was on the appellants to prove negligence. After a most thorough trial of the facts and

¹³⁸ Conclusion of Law No. 2, R. 97.

¹³⁹ Conclusion of Law No. 3, R. 97.

¹⁴⁰ Conclusion of Law No. 4, R. 97.

an on-the-ground investigation, the trial court declared there was no proof of negligence on the part of the United States.

However, too great emphasis may not be placed upon the fact that the record discloses affirmatively that the United States exercised reasonable care under the circumstances in regard to every factor of the case. Having exercised reasonable care in every respect, the United States fulfilled the obligation imposed upon it by the law. For, "actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to the other."¹⁴¹ Few precepts of the law are more firmly established. Applying that criterion to the present case, it is manifest from the record that the United States met that standard in every respect. Relative to the construction of the north canal, the appellants' principal expert witness testified as follows:

Q. What is the general practice concerning their [canal] construction?

A. I think it [the north canal] follows the general practice on this canal.

Q. In other words, this is the general practice of constructing canals in the area?

A. Yes, sir; I think so.¹⁴²

¹⁴¹ 38 Am. Jur., Negligence, sec. 2, p. 643.

¹⁴² R. 358, Testimony Allen C. Merritt.

Q. The fact that the segment of the North Canal breached stood for approximately eleven years prior to the alleged failure is evidence of reasonable construction, is it not?

A. I would say so, yes, sir.¹⁴³

That the United States followed the general practice in the area when it constructed the north canal is free from doubt. In substance Oregon's highest court has declared that there can be no liability in the absence of proof of negligence, and "negligence is the absence of care according to the circumstances."¹⁴⁴ It has likewise been authoritatively stated that, "The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent is the care which an ordinarily prudent person would have exercised under like circumstances."¹⁴⁵ In measuring due care there is no immutable criterion. Nevertheless "General usage or custom may be shown in order to establish a standard of diligence to which the party sought to be charged is required to conform."¹⁴⁶ Further, "one cannot ordinarily be said to be negligent if he does that which ordinary men, like situated, do."¹⁴⁷ Affirmative proof, therefore, is in the record that the United States in the construction of the north canal met the standard of care which the law requires.

¹⁴³ R. 376, Testimony Allen C. Merritt.

¹⁴⁴ *Rice v. City of Portland*, 141 Ore. 205, 213, 7 P. 2d 989, 17 P. 2d 562 (1932).

¹⁴⁵ 38 Am. Jur., Negligence, sec. 30.

¹⁴⁶ Shearman and Redfield, Negligence, rev. ed., sec. 10, p. 18.

¹⁴⁷ *Grammer v. Mid-Continent Petroleum Corporation*, 71 F. 2d 38, 40 (C. A. 10, 1934), cert. denied 293 U. S. 571 (1934).

In regard to inspection, operation and maintenance and repair, the appellants offered no evidence that the United States had not met the standard of care required. Premised upon the evidence adduced by the United States the court, having reviewed the fact that the north canal was inspected twice daily and had been inspected a half hour before the failure, declared: "This is shown to have been the usual custom of the Government in regard to inspection. It was unquestionably adequate to fulfill the duty of exercise of ordinary care."¹⁴⁸ As to operation and maintenance, the court stated: "The Court believes the operation of the canal at full head at a time when everyone was crying for water was in the exercise of ordinary care."¹⁴⁹ As to inspection prior to repair the trial court specifically found: "The evidence established that at the time of making the first repair, the defendant [United States] made an investigation to ascertain the cause of the break and exercised reasonable care in that regard; * * *."¹⁵⁰ Regarding repair, the trial court specifically found that: "The evidence established that the defendant [United States], acting in an emergency, took prompt and efficient methods to rebuild * * * the north canal * * * and the work of repair of the break was done and completed promptly, with reasonable care and in a good workmanlike manner."¹⁵¹ Thus in

¹⁴⁸ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 68.

¹⁴⁹ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 66.

¹⁵⁰ Finding of Fact No. 16, R. 96.

¹⁵¹ Finding of Fact No. 15, R. 96.

every element of the case the record shows affirmatively that the United States exercised reasonable care.¹⁵² In the light of the proof that the United States exercised reasonable care in every respect it is manifest that the trial court properly denied appellants relief on the charge of negligence, for by so doing the United States refuted the charge of negligence. It proved that it did what a prudent man would have done under the circumstances of the situation—the very reverse of negligence.¹⁵³ Though the burden of proof was on appellants and they failed in their burden,¹⁵⁴ the United States rebutted any inference of negligence by its proof of exercise of reasonable care. As stated in a highly pertinent and recent case: “The defendant by showing how the accident happened may establish that it was not due to his fault. *Shearman and Redfield on Negligence*, Rev. Ed., pages 154–155. It is not necessary, however, for the defendant to go that far. He need not show how the accident happened, if without doing so he can establish that he did his full duty under the circumstances to guard against it.”¹⁵⁵ Continuing, the court stated: “Any inference of negligence of the defendant which may have arisen because of the mere happening of the accident has been effectively rebutted. To hold otherwise would be to make the defendant an insurer regardless of negligence.”

¹⁵² For a full review of each of the elements discussed and documentation from the record, please refer to pages 21 through 32.

¹⁵³ *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1942).

¹⁵⁴ R. 96, 97.

¹⁵⁵ *Great Atlantic & Pacific Tea Co. v. Kennebec Water Dist.*, 140 Me. 166, 34 Atl. 2d 729, 730 (1943).

Highly significant, therefore, is the finding of the trial court that: "at the time the first repair was made, the defendant [United States] did not know the cause of the first break, and * * * defendant [United States] did not know of anything that would cause it to anticipate the occurrence of the second break."¹⁵⁶ That the United States or any other canal operator is not an insurer to those who receive water from a canal is too clear for question. For even where lands have been flooded as distinguished from the failure to deliver water, this Court has specifically declared that a canal owner is not an insurer but rather: "Liability for damage is not to be assumed without proof of some fault or negligence on the part of the defendants."¹⁵⁷ Here not only did the appellants fail to prove negligence—the United States proved that it was not negligent, having exercised reasonable care relative to every aspect of the case.

VI

Having failed to prove negligence, the appellants may not on appeal change their claims from tort to contract¹⁵⁸

Appellants failed to prove negligence on the part of the United States. Thus confronted, they now assert

¹⁵⁶ Finding of Fact No. 16, R. 96.

¹⁵⁷ *Eikland et al. v. Casey et al.*, 290 Fed. 880, 882 (C. A. 9, 1923).

¹⁵⁸ Cited by appellants at the outset of their argument is the case of *Ickes v. Fox*, 300 U. S. 82 (1936). As the sole question in that action was whether the United States was an indispensable party to an injunction suit against the Secretary of the Interior it has no pertinence and no bearing upon the matter before the Court.

that their claims are for breach of contract.^{158a} That position is taken although the cases in question were all tried under the Federal Tort Claims Act.¹⁵⁹ Manifestly, at this stage of the proceeding, these consolidated cases may not now be brought within the purview of the so-called Tucker Act.¹⁶⁰ Two provisions of that act make unavoidable that conclusion: (1) The waiver of sovereign immunity of the United States contained in the act insofar as here pertinent, relates to claims "upon express or implied contract * * * not sounding in tort." (2) No claim exceeding \$10,000 may be tried in the district court under that waiver of immunity.¹⁶¹

In regard to suits against the United States under the Tucker Act, this statement has been made: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied con-

^{158a} Appellants' Opening Brief, pp. 15-36.

¹⁵⁹ 28 U. S. C. 1346 (b).

¹⁶⁰ 28 U. S. C. 1346 (a).

¹⁶¹ 28 U. S. C. 1346 (a): "The district courts shall have original jurisdiction concurrent with the Court of Claims, of: * * * (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

tract.”¹⁶² It was undoubtedly the fact that the Tucker Act did not permit suits against the United States in tort which caused Congress to enact the “Federal Tort Claims Act.” It is unnecessary to labor further the proposition that appellants must bring their claims within the purview of some specific waiver of immunity when they proceed against the United States.¹⁶³ It is only when the claimants’ cases come clearly within the purview of the waiver of immunity and it is a question of granting full relief that the courts have not adhered to the strict rules discussed above.¹⁶⁴ Here it is manifest that the cases do not come within the waiver of immunity under the Tucker Act which specifically excludes claims sounding in tort. It cannot be denied that these cases sound in tort. Appellants brought them against the United States as torts. They did not assert that their claims were in contract until the trial court declared there was no negligence on the part of the United States. As they are tort claims the clear expression of Congress that the Tucker Act does not apply to claims sounding in tort would preclude the appellants from now claiming under that act.¹⁶⁵

¹⁶² *Hill v. United States*, 149 U. S. 593, 598 (1892); see also *Schillinger v. United States*, 155 U. S. 163 (1894).

¹⁶³ *Belknap v. Schild*, 161 U. S. 10, 16 (1895); *United States v. Shaw*, 309 U. S. 495, 502 (1939).

¹⁶⁴ *Brooks v. United States*, 337 U. S. 49, 51 (1949); *United States v. Aetna Life Insurance Co.*, 338 U. S. 366 (1949); *Feres v. United States*, October term, 1950, decided December 4, 1950; *United States v. Yellow Cab*, October term, 1950, decided February 26, 1951.

¹⁶⁵ *United States v. Sherwood*, 312 U. S. 584 (1940).

Respecting the limitation of the jurisdiction of the district court under the Tucker Act to claims not exceeding \$10,000 this salient fact is presented: Of the 51 appellants' claims before this Court 5 of them exceed \$10,000.¹⁶⁶ Those claims exceeding \$10,000 were consolidated with the others for trial below. Those cases were consolidated with the others here on appeal.

In substance, therefore, appellants now seek to deny that the forum in which they sought relief had jurisdiction. If their contentions are correct it is respectfully submitted that this Court on appeal would necessarily be without jurisdiction. It is denied, however, that appellants could create such an incongruous situation—Appellants sued in tort, the trial court found no negligence on the part of the United States and entered judgments for it. Those judgments should be affirmed.

VII

The United States could not have been negligent in regard to appellants as it has no contract with them and owes them no duty—no negligence in absence of duty

Quite aside from the jurisdictional aspect raised by appellants' contention that their claims are for a breach of contract rather than tort, there are two complete defenses to their claims which appellants leave unchallenged:

1. The appellants have no contract with the United States—their contracts are with the irrigation district.¹⁶⁷

¹⁶⁶ Howard Bybee and B. G. Bybee; John Allmer; James A. Davis; Lem Wilson; Emmett Smith.

¹⁶⁷ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Findings of Fact Nos. 3, 6, 7, R. 90, 93.

2. The contract between the United States and the irrigation districts specifically waives liability on the part of the United States for shortages of water "on account of drought, inaccuracy in distribution or other causes."¹⁶⁸ Appellants accepted, confirmed and consented to that contract specifically waiving any liability on the part of the United States for any shortage of water.¹⁶⁹

As appellants have no contract with the United States there can be no duty owing to them by the United States. That statement is premised upon the fundamental principle that: "Actionable negligence consists of a duty, a violation thereof, and a consequent injury. The absence of any one of the three elements is fatal to the claim."¹⁷⁰ There are few rules of law more firmly established. It has been recognized by the Supreme Court of the United States¹⁷¹ and by the Supreme Court of the State of Oregon.¹⁷² Further, the duty, the breach of which constitutes negligence, must be a legal duty.¹⁷³ As stated by the Supreme Court of the State of Oregon, a legal duty "may

¹⁶⁸ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

¹⁶⁹ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 6, R. 93.

¹⁷⁰ Shearman and Redfield on Negligence, rev. ed., vol. 1, sec. 3, p. 9.

¹⁷¹ *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220 (1912).

¹⁷² *Sanders v. California-Oregon Power Co.*, 133 Ore. 571, 291 Pac. 365 (1930).

¹⁷³ Shearman & Redfield on Negligence, rev. ed., vol. 1, p. 12, par. 5.

arise out of contractual relations or it may be imposed by law.¹⁷⁴ In a case involving alleged negligence in the operation of an irrigation system the statement was made: "It is elementary that actionable negligence only arises from the violation of a duty to the injured party."¹⁷⁵ That principle was reiterated in a similar case in these terms: "This action is for tort. To recover, the plaintiff must show that the defendant owed him some duty which he failed or neglected to perform."¹⁷⁶

As the facts will reveal, appellants have never entered into a contract with the United States. Nor has the United States entered into any contract pursuant to which the appellants could successfully assert rights as third-party beneficiaries. Having failed to disclose any privity with the United States they are unable to establish a duty arising by contract upon which to premise a claim recognized by the law.¹⁷⁷ There being no contractual duty owing to the appel-

¹⁷⁴ *Sanders v. California-Oregon Power Co.*, *supra*, footnote 172.

¹⁷⁵ *Salt River Valley Water Users' Assn. v. Delaney*, 44 Ariz. 544, 39 P. 2d 625, 626 (1934).
39 P. 2d 625, 626 (1934).

¹⁷⁶ *Chavez v. Lopez*, 35 N. M. 61, 290 Pac. 741 (1930).

¹⁷⁷ *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220 (1912).

Affirming 174 Fed. 764, 766 (C. A. 4, 1909); both the Supreme Court and the circuit court in the cited decisions discuss the fundamental tenet here involved. *Creedon v. Automatic Voting Mach. Corp.*, 243 App. Div. 339; 268 N. Y. 583; 198 N. E. 415 (1935). In the report appearing in 243 App. Div. 339 of the case last cited the court pointed out that plaintiff could not recover in tort by reason of the fact that he was unable to disclose a duty owing to him as he was neither a party to the contract nor entitled to recover as a beneficiary under the contract pursuant to the doctrine of *Lawrence v. Fox*.

lants by the United States they are not entitled to recover from the United States as they have failed to prove the most essential element of negligence—duty.

To be observed is the fact that the trial court did not find a duty under the contract but rather stated that the obligation of the United States was that of a common carrier. As the trial court found that there was no negligence the point is not fundamental to the decision. It is noted, however, that the United States is a sovereign of delegated powers and may act only as a sovereign.¹⁷⁸ It has not been empowered to function as a common carrier, public utility, irrigation district or other agency engaged in supplying water to users. Thus it may not assume the responsibilities of agencies of that character.¹⁷⁹ In addition, the State in the exercise of its police power may not impose upon the United States a duty to supply water to the plaintiffs.¹⁸⁰ Thus the reference to State police regulations by appellants has no application here. Certainly it may not be contended that the Federal Tort Claims Act subjected the United States to the control of the State legislatures. Moreover, the sections of State law cited by appellants relate to

¹⁷⁸ *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, 102; *Federal Crop Insurance Corp. v. Merrill, et al.*, 332 U. S. 380, 383 (1947).

¹⁷⁹ *United States v. Curtiss-Wright Export Co.*, 299 U. S. 304 (1936). That case defines in concise language the nature and the limitations of the powers enjoyed by the Federal Government.

¹⁸⁰ *Arizona v. California*, 283 U. S. 423, 451 (1930); *Hunt v. United States*, 278 U. S. 96 (1928); *Johnson v. Maryland*, 254 U. S. 51 (1920).

flooding and not to failure to deliver water, the sole questions here involved.

Pertinent and much to the point are the comments of the Supreme Court of the State of Nebraska as to the relationship of the United States to the irrigation districts and to the water users under contracts the same in substance as the contract which the United States had in these cases with the irrigation districts. The Nebraska court stated: "The contention of the plaintiff that the district is operating an irrigation system through the instrumentality of the United States is untenable."¹⁸¹ That statement would apply equally to the contention that the United States is a common carrier of water for the appellants. To labor the proposition further that the United States as a sovereign of delegated powers could not be a common carrier and that the Federal Tort Claims Act could not so constitute it would in no way aid this Court. Suffice to say that the trial court found no evidence of negligence on the part of the United States and dismissed the claims on the merits.

Apparently ignoring the fact that they had no contract with the United States the appellants nevertheless devote a large part of their brief to the question of contract.¹⁸² It is denied, as above stated, that there is a contract between them and the United States. Assuming, however, solely for the purposes of argument that there was a contract between the United States and the appellants, the appellants are,

¹⁸¹ *Livanis v. Northport Irr. Dist.*, 121 Neb. 777, 238 N. W. 757 (1931).

¹⁸² Appellants' Opening Brief, pp. 14-36.

nevertheless, precluded from recovery. That statement is premised upon the fact that appellants not only failed to prove negligence on the part of the United States but the evidence conclusively proved that the United States had exercised reasonable care in every aspect of the case. Having failed to prove negligence on the part of the United States, there is no basis for recovery. Reference in that regard is made to the authorities upon which appellants rely.¹⁸³ To be noted is this fact: In every instance where the statement is made that a duty may arise by contract upon which a claim in negligence may be predicated is the added statement that negligence must be proved.¹⁸⁴ That is manifest from the authorities cited by appellants which specifically declare that a requisite to such an action "is negligent failure to" perform the contract.¹⁸⁵ Here there was no negligence. Thus the authorities cited by appellants on the subject are without meaning.

VIII

Appellants have waived any liability on the part of the United States by reason of shortages in the supply of water

There was no negligence on the part of the United States. There was no contract between the United States and appellants, thus there is no privity between the United States and appellants upon which a duty

¹⁸³ Appellants' Opening Brief, p. 18 et seq.

¹⁸⁴ Appellants' Opening Brief, p. 18, pp. 22-23 citing 38 Am. Jur. 661-662 sec. 20.

¹⁸⁵ See Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 15 et seq.; 38 Am. Jur., Negligence, 661 et seq.

could arise.¹⁸⁶ Assuming, however, that those two insurmountable barriers to appellants' recovery were removed, there remains a final obstacle preventing recovery on their part.

As stated, appellants have no contract with the United States. The United States has contracts with the irrigation districts comprising the Owyhee Reclamation Project. Appellants confirmed and consented to the contracts between the United States and the irrigation districts. Courts of competent jurisdiction approved those contracts. Those contracts consented to and confirmed by appellants themselves provided that the United States would not be liable for shortages in the supply of water for irrigation "on account of drought, inaccuracy in distribution or other causes."¹⁸⁷ That unqualified waiver of liability for the failure to deliver water precludes recovery. Had there been negligence on the part of the United States, and there was not; had there been a contract between the appellants and the United States which would give rise to a duty from the United States to them, and there was not; appellants would still be precluded from recovery. That waiver of liability is a complete and effective bar to any recovery by appellants against the United States.

CONCLUSION

The trial court found no negligence on the part of the United States. Appellants had expressly

¹⁸⁶ Shearman and Redfield on Negligence, rev. ed., vol. 1, p. 16.

¹⁸⁷ Opinion March 13, 1950, of James Alger Fee, Chief Judge, R. 58; Finding of Fact No. 4, R. 92.

waived any claim for liability against the United States had there existed facts upon which negligence could have been predicated. Accordingly, it is respectfully submitted that this Court upon appeal should affirm the trial court.

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United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M.
WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS REPLY BRIEF

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the District of Oregon.*

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No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M.
WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS REPLY BRIEF

*Appeals from the United States District Court, for
the District of Oregon.*

In replying to Respondent's brief, we shall follow the order of their argument as closely as possible. Respondent opens its argument by charging us with erroneous statements of fact in our brief. We reply to the glaring charges.

Respondent charges (p. 8 Res. Br.) "Error No. 1."

This assertion deals merely with the terms "wall" and "bank" which were used interchangeably. Neither a "wall" or "bank" was built. (Terhune Tr. 277). Oscar G. Boden was testifying about what the plans and specifications called for, and not what happened. (Tr. 535)

Error No. 2 (p. 8 Res. Br.) regarding whether the lower bank was in fill.

We point to the testimony of R. J. Newell, the defendant's area manager and Chief Engineer when

the project was constructed, (Tr. 467-68) quoted P. 161 of our appendix.

“A. (By Mr. Boden) That is basically the purpose.”

And Mr. Newell (Tr. 496-97)

“Do you think that by putting in the core wall as Mr. Terhune testified was put in you have cut off the seepage through the side of the canal?

A. I think so.

Q. That would lead to the other conclusion, that if a core wall of the same type was put in to start with you would perhaps not have had any seepage through it?

A. I think that is correct.”

The second break was caused by not extending the core wall far enough.

“A. I have an opinion that it was not caused by the overflow but that the repair did not reach far enough downstream in the first case.” (Newell Tr. 496-7)

Reference is made to the testimony of Mr. Boden and Mr. Newell “That wherever porous material was encountered, it was removed and replaced by fine select material.”

These witnesses testified to a theory, not as to what was done at this point. Mr. Boden was testifying from field notes made before any construction was performed. (Tr. 543-44-45) and would not show the presence of porous areas and he had no recollection of surveying or other record indicating whether or not any porous spots or areas had been encountered. (Tr. 544-45). On the other hand Mr. Gordon (Tr. 658 App. 129), Mr. Newell, Mr. Carter (Tr. 571, App. 113-14) testified that the break was caused by water seeping through the bottom and sides of the canal indicating extreme porosity. These were all defendants engineers and their testimony thoroughly cor-

roborated appellants engineer's Mr. Merritt. (Tr. 343)

Error No. 4 (Res. Br. 11) challenges the presence of seeped areas close to the bank of the canal. We call attention to the uncontradicted testimony of the appellant's witnesses, Matherly (Tr. 125-29, App. 146), Hawkins (Tr. 138-39, App. 148-49-50), George Hust (Tr. 171-72, App. 150). Mr. Carter one of defendant's engineers testified that the farmers ditch at places was 5 feet from the toe of the canal "other places it was maybe 20 feet away. It didn't exactly follow the toe of the bank." (Tr. 579-81, App. 156)

Also the testimony of appellants witness John Turner (Tr. 187-89, App. 151-52) and Ben Shaw (Tr. 200-201, App. 153-54).

Judge Fee was of the opinion that:

"It was unquestionably proved that there were structures near the canal which were pervious to water, and that these were saturated at the time of the break." (93 Fed. Sup. 783-84)

Error No. 5 (Res. Br. 5), here counsel complains of "One of the most greivous and patently incorrect statements is appellants repeated allegation that there was a total lack of inspection of the area in which the break in the north canal occurred."

We treated this matter at page 71 et seq. of our opening brief. We failed, however to point to the whole record or to do justice to the authorities.

Other than the two occasions upon which Mr. Spofford, who was in charge of the maintenance of the canal (Tr. 689-690) walked through the canal bed in the fall of 1944-45 (Tr. 713-716, app. 136-138) the records show no other inspection except the observation of the ditch rider Mr. Pettett (Tr. 757-764) whose inspection consisted of driving a car along the roadway on top of the ditch. (Tr. 761)

Mr. Pettett, who was relied upon for inspection, was

an employee of the Owyhee Irrigation District (Tr. 757) whose duty was to deliver water to the individual farmers in addition to dividing the water among the farmers. (Tr. 758)

There is no claim that Mr. Pettett has any special training as an engineer, or possesses any qualifications to enable him to judge the security of the structure, or that he ever made any inspection upon which he could judge the safety of the canal.

The ditch riders are selected from available farmers, *not trained engineers*.

Mr. Spofford testified: (Tr. 695)

“Q. How do you select these men?

A. Well, these men, we try to get qualified men, and preferably men that are farmers and understand farming.”

As we said in our opening brief evidence of a leak or seep would not show up along the *top of the canal* where Mr. Pettett traveled. Even if capable he should have made his inspection from a point where a defect was discernible.

The duty of inspection is an absolute duty, to be actually made by persons competent to perform that duty. *Thompson Commentary on the Law of Negligence* Vol. 4, Sec. 3791-3792, *Northern Pacific R. Co. vs Peterson* 162 U.S. 346, 16 Sup. Ct. 843, *Western Union Tel. Co. vs Treny* 114 Fed. 282.

In *Lafayette Bridge Co. vs Olsen* 108 Fed. 335 (7 C.C.A.) the sufficiency of a plank to sustain pressure was involved. We read: (341)

“It was chargeable with such knowledge as a proper inspection would have given. The defect may not have been obvious to the untrained eye and the unskilled laborer, or to the foreman, but to one experienced in woodcraft, as the evidence shows, the defect might have been discovered, and,

if discernable, the master is chargeable with the knowledge which the inspection would have given."

The court based the adequacy of the inspection on a false premises. We read from the opinion: (93 Fed. Sup. 785)

"The only question involved is whether it was sufficient to have a person ordinarily skilled in irrigation problems to make such inspection or whether it was necessary to have an inspection by a competent engineer who would make appropriate tests."

This is answered, contrary to the Court's finding, by *Suko vs Northwestern Ice Co.* 166 Or. 557, 113 Pac. (2) 209, and the Lafayette Bridge Co. case supra.

And there is no question about the lack of skill of the inspectors.

The inspection was not made by persons "ordinarily skilled in irrigation matters" but by men selected because "They are farmers and understand farming." (Spofford Tr. 695)

Erros No. 6, 7 and 8. (Res. Br. 13-16)

Since counsel makes the same argument in each of these assigned errors we shall content ourselves with a single answer to both specifications. They have to do with the relation between the first repair and the second break. The over-flow or over-topping of the canal after the first repair was proven and tending to show negligence in overloading the canal before it was repaired to a point where it would carry the water without a great strain on the incomplete portion. Counsel say:

"There was no casual connection between the condition of the repair and the second break."

We treated this question rather thoroughly at P. 65 et seq. of our first brief and believe that the record referred to there clearly demonstrates negligence.

The second break occurred immediately downstream from the first break. (Terhune Tr. 264)

This places the second break very close to the first repair. In point of time they were still working on the repair of the first break when the second break occurred. (Gordon Tr. 616-17) Having knowledge of the water soaked condition of the canal bed at the point of the first repair no inspection was made beyond that point yet exactly the same condition existed. (Gordon 677)

The condition of the canal at that point is shown by Mr. Gordon's testimony. (Tr. 647)

So, we have from defendant's witnesses the following facts, a partial repair following the first break, the canal bed eroded, some three feet below the normal bed for a hundred to a hundred and fifty feet downstream, and past the point of the second break.

With no inspection of the canal bed in the eroded area the defendant's employees released sufficient water to overflow the canal, and while the machines were still working to stop the overflow, the second break occurred.

There was gross negligence in the following respect:

1. Knowing the water soaked condition at the first break no inspection was made to determine the condition immediately adjoining the first repair.

2. Releasing water into the unfinished canal without making an inspection.

3. Releasing into the canal, in that condition more water than it could contain, thus placing a greater pressure on the canal than it would sustain.

When the first repair was made, the defendant knew that no core wall had been constructed in the old bank but they placed a core wall in the new bank. The first repair work gave notice of the porous nature of the structure showing necessity of a core wall and yet no

core wall was extended over the porous area. The danger of a second break was perfectly obvious while the first repair was being made. The most succinct statement of what caused the second is found in the testimony of R. J. Newell the defendant's chief engineer. (Tr. 497, App. First Br. 133-34)

Most of the matter contained in the Preliminary Statement (p. 4-19 Res. Br.) is a repetition of the matter presented in the eight errors assigned by respondent and answered in the foregoing text.

However, there are several other statements found in that part of respondent's brief that merit attention. For instance we read: (p. 9 Res. Br.) "Whenever in the construction of the north canal porous or unstable earth or material was encountered, it was removed. It was then replaced by fine selected material which was compacted."

Reference to the designated part of the record shows that *this was only a requirement of the plans*. There is not a word of testimony in the record showing that this requirement was met or the absence of available testimony on that point accounted for. (Mr. Boden Tr. 543-44)

The witness further testified he could not remember of seeing any notes indicating the charges for replacing porous material.

Again (P. 15 Res. Br.) in describing the second break we read:

"The water emanated from a hole in the bank, an emanation took place in the natural earth of a hitherto dry canal bank, far removed from the seep concerning which appellants failed to establish any casual relation with the canal failure."

Instead of emanating from a *dry bank*, the bank, and the remaining base, was water soaked. Mr. Gordon testified on this point (Tr. 658-59, App. Op. Br. 129)

to the effect that the lower bank at that point was practically fluid mud.

Instead of being far removed from the seep on the Shaw place the second break was at a point immediately adjacent to the seeped area concerning which appellants witnesses testified about. (See Exhibit 82.)

RESPONDENT'S DISCUSSION OF CONSTRUCTION OF THE NORTH CANAL (Res. Br. 21)

Under this branch of their brief, counsel, with remarkable repetition (some 10 times) call attention to the fact (mentioned by Judge Fee) that the canal had stood for 11 years and sought to infer from that fact that there had been careful construction.

Considering what was found on July 9th, 1946, it was remarkable that the canal stood that long.

However, there had been two major breaks in the meantime. Sound construction does not anticipate a break of this nature every eleven years. Much less three major breaks in that time. When farmers pay some nineteen million dollars (Tr. 457) for an irrigation system it is to be expected that the structure will last at least until it is paid for.

Besides a large unlined canal carrying 450 second feet of water and absorbing water as shown by this record, is a constant menace to its own safety and good management required constant inspection by trained and skilful inspectors.

Undoubtedly defendant's engineers relied upon the fact that the structure had stood for eleven years and needed no further attention at this point.

The authorities cited by appellant (p. 106 Op. Br.) indicate that the evidence afforded by the fact that the structure stood for eleven years is very slight.

Respondent's witness Senger testified: (Tr. 780)

"* * * We had a failure in a canal on the Idaho Power Co. system, where the thing had been operating twenty years."

Mr. Carter, appellants engineer, testified that percolation here might take years, and Mr. Gordon testified (Tr. 667)

"A. I will agree that water will go through the formation, but at a very low rate.

Q. And assuming that this canal was built in '34 and it went out in '46, it evidently did take a long time to percolate down.

A. I can repeat that it percolated at a very slow rate."

When the court considers that the water was out of the canal for the non-irrigation season each year, the rate of percolation and its consequent results in this case robs the fact that the canal stood for eleven years before failing of any probative value.

COUNSEL'S DISCUSSION OF INSPECTION (Res. Br. 24-26)

Counsel endeavor to sustain the trial court's finding of adequate inspection. This finding is square against the evidence. We have stated our position with authorities at pp. 3-4 supra, and these cases with the authorities in our first brief (p. 71-79) demonstrates the trial court's error in finding adequate inspection.

The fact that Mr. Pettett, the ditch rider, was an employee of the Owyhee Irrigation District (Tr. 757) failed to make an adequate inspection would not exonerate the defendant. We read in Restatement (Torts) 994, Section 366:

“If a careful inspection would have disclosed the defect, and the risk involved therein, it is immaterial whether the failure to discover it is due to the possessor’s failure to make an inspection or cause it to be made or by the inadequacy of an inspection made by him or by an independent contractor.”

COUNSELS DISCUSSION OF OPERATION AND MAINTENANCE (Res. Br. P. 26)

Under this head, counsel discusses authorities on drainage which is not involved here. True, there is always involved the matter of seepage from canals and especially large canals like that involved here. This always involves danger, hence requires careful inspection and watching.

This is plainly shown by the testimony of Mr. Newell Tr. 491, App. Op. Br. 154, and Tr. 487-88, App. Op. Br. 154-55, and Tr. 507, App. Op. Br. 155 and the testimony of Mr. Carter 579-81 App. Op. Br. 156-57.

The assumed facts on which this testimony was given was established by the uncontradicted testimony of some six of appellants witnesses. Matherly, Tr. 125-29, App. Op. Br. 146-48, Hawkins Tr. 138-39, App. Op. Br. 148-49, 50, Hust Tr. 171-72, App. Op. Br. 150, Turner Tr. 187-89, App. Op. Br. 151, Ben Shaw Tr. 200, App. Op. Br. 153, and Judge Fee’s Op. (93 Fed. Sup. 783-784).

COUNSELS DISCUSSION OF INVESTIGATION PRIOR TO REPAIR (Res. Br. 29)

We challenge that part of the Court’s finding quoted by counsel “And that at the time the first repair was made, the defendant did not know the cause of the first

break and that defendant did not know of anything that would cause it to anticipate the occurrence of the second break."

The record virtually shouts with the cause of the first break. Carter (Tr. 571, App. Op. Br. 111), Gordon (Tr. 618, App. Op. Br. 112-113), Newell (Tr. 511-512, App. Op. Br. 113-114).

This testimony is a complete corroboration of the testimony of appellants witnesses. Merritt (Tr. 343, App. Op. Br. 109), Bouton (Tr. 426, App. Op. Br. 109), Bronken (Tr. 446, App. Op. Br. 110).

With these conditions in the canal depicted by this evidence, at the point of the first break, the same condition or one equally dangerous should have been anticipated in the canal 50 feet further downstream. Any type of inspection would have readily disclosed it.

It is hornbook law that defendant was charged with the knowledge that a reasonable investigation would have revealed.

No investigation of the area was at all made prior to repairing the second break. (Gordon Tr. 677-78, App. Op. Br. 134). The court's finding that there had been adequate inspection is directly opposed to the testimony from defendant's star witness.

COUNSELS DISCUSSION OF REPAIR

(Res. Br. 30-31)

The only part of this discussion that is material or justifies a reply is the language on Page 31 where we are criticised for contending that water was turned into the canal before the first break was repaired where we read: "That statement is likewise refuted by testimony diametrically opposed to the contention."

The principal testimony on this point comes from Mr. Gordon, Respondent's engineer in charge of the

repair. (Tr. 646-647, App. Op. Br. 130-31). We have called attention to this testimony at pp. 5-6 supra.

It shows that the bottom of the canal had been eroded away to a depth of from three feet at the point of the break and becoming less either way from the break for a distance of 350 feet up stream and 100 to 150 feet downstream.

COUNSELS DISCUSSION OF DEFENDANT'S LACK OF KNOWLEDGE (Res. Br. 32)

Here again, counsel lays great stress on the facts that there had been no break at this point during eleven years of the canal's existence. We have replied to that thought supra. (p. 8)

Counsel again tries to read out of the record the fact that the canal was built over a porous structure saying: (P. 33).

“The fact renders ridiculous the repeated assertions of appellants that the North Canal was built over a loose and porous material incapable of holding water.”

No one seriously contends that there was not a porous structure at the point of the break. For instance Gordon described the porous structures (Tr. 665):

“A. Well, I would have to presuppose that there is something below this stratum which is more porous than the stratum itself.

Q. Well, you would hit a stratum down there that was so porous that it was like quicksand?

A. That is correct.”

We have called attention to testimony of Newell and Carter (supra p. 2) on this point that the water seeping into the lower structure caused the canal's failure.

Since counsel has made innumerable references to

Judge Fee's opinion, we take the same liberty and point to his language: (93 Fed. Sup. 783).

"However that may be, it is unquestionable that the defect could have been avoided by lining the canal with concrete at the particular point, building an inner core or a like structure upon the side and bottom of the canal, and finally by digging out the soft structure and permitting the canal to be lined with impervious material. Since the defect in the structure was not discovered at the time of construction, no such measures were taken. However, there is no doubt from the testimony which is now in the record that the defect could have been discovered, had proper tests been taken at the time of construction or afterwards. Competent engineers, however, must admit that the mere fact that these structures, which would not hold water, were buried four to six feet beneath the canal and over a space of two hundred to three hundred feet along the center line could have been discovered with proper test at the time of construction."

To this statement the court should have added that these porous structures were plainly visible in the walls and bottom of the canal and are present today except as remedied by the repairs made after the break. Again the court said: (p. 783).

"The essential element of negligence would have been the release of a full head of water before inspection to insure stability in the canal."

That is exactly what happened regarding the second break and pleaded as one of the basis of negligence and is treated at pp. 65-69 Op. Br.

See testimony of Percey (Tr. 214-220, 222-223 App. Op. Br. 115-20, Hawkins Tr. 150-51, App. Op. Br. 120-122, Gordon Tr. 647, App. Op. Br. 132).

Continuing the court said: (93 Fed. Sup. 783).

"If a single devise of building a core wall would have prevented the disaster, this necessity seems too plain for argument."

The records shows that a core wall would have prevented the break. (Newell Tr. 496-97, Bouten Tr. 427, Merritt Tr. 396)

No core wall was built, (Terhune Tr. 277) or if the three cubic yards spoken of by Boden (Tr. 541) was placed it was entirely ineffectual as a core. (Gordon Tr. 661)

Further the Court said: (Fed. Sup. 783)

"Likewise, if a break would not have occurred had the canal been lined at this point with concrete, as it is in some other sections, efficient inspection would have disclosed the necessity."

Concrete lining is resorted to in short areas to prevent exactly what happened here. (Newell Tr. 470)

"Where the canal was located high on the bank of a steep hillside so that a break would be especially dangerous, and the appearance of the formation was unfavorable, concrete lining was resorted to."

The record shows that there was concrete lining in the north canal both above and below the break and that the north canal was built on a hillside, some 200 feet above the level of the valley.

The court continued: (783-84)

"As for the ideas that a defect was hidden does not comport with the respect which the Court has for the engineering profession to hold that such a situation, now hypothetically assumed, could not have been discovered and proper precautions taken against a break by thorough inspection during construction.

The Court was not convinced that the attempted explanation of the government experts was valid. *"It was unquestionably proved that there were structures near the canal at the points which were pervious to water, and that these were saturated*

at the time of the breaks. But the evidence did not disclose why or how the break happened eleven years after construction. Since the burden of proof lay on plaintiffs to establish cause and damage as a proximate result, no liability can be found in this state of the record. *In view of the nature of the duty to deliver water, res ipsa loquitur does not apply.*"

The facts being as related by the Court, *supra*, it is clearly a case for the application of the *res ipsa loquitur* rule.

But aside from the force of the *res ipsa* rule the above facts, to which the court called attention, show negligence:

(1) In not building a core wall; (2) In not discovering patent defects in the structure (3) In not making adequate inspection (4) In releasing an excessive amount of water into the canal after the first break, with no inspection of the area damaged by the break, and particularly no inspection of the immediate area where the second break occurred.

The court correctly appraised the dangerous nature of the canal and appreciated the necessity of a high degree of care as evident from the quotation taken from *Suko vs Northwestern Ice Co.* 166 Ore. 557, 113 P. (2) 209, and *3 Kinney on Irrigation Sec.* 1669, P. 3069, found at page 791, *93 Fed. Sup.* and was satisfied that the defendant did not live up to the degree of care required as shown by his comment at P. 791-92 of *93 Fed. Sup.* which we quote:

"Here there was a stream of water—36 miles long—flowing 450 second feet of water in an earthen canal through a structure which was incapable of holding the force thereof."

* * *

"The defendant was handling a highly dangerous instrumentality in a position where the lands of plaintiffs were peculiarly exposed to peril, and

was bound to exercise a degree of care proportionate to the injuries likely to result to others if the ditch did not hold the stream. When plaintiffs proved the collapse of the wall of the canal and the injuries suffered by him, he made out a *prima facie* case of negligence. 'A very high degree of danger calls for a very high degree of care, which, however, amounts to no more than ordinary care in such a case.' The defendant knowing the structures over which this canal was built at this point, was bound to make detailed engineering inspections from time to time while the canal was carrying a heavy load of water. There was no proper care taken, and the liability would be found by the Oregon courts in a case between private citizens."

The acts and omissions above criticised are the same acts and omissions relied upon by appellants to establish negligence.

The duty owed to appellants to deliver water is just as important in the eyes of the law, as was the duty not to trespass on the lands of these parties.

No distinction can be drawn in applying the same negligent acts between damages from trespass and damages for failure to perform a contract.

The authorities in our opening brief (pp. 75-79) answer the contention of counsel that they had no knowledge of the defects in this canal. As Judge Fee said, there was no defect in the canal that ordinary inspection would not have revealed.

COUNSELS DISCUSSION OF PROXIMATE CAUSE (Res. Br. 41)

We find it difficult to follow counsels argument. The proximate cause of appellants damage was the defendants failure to deliver water to appellant for irrigation. This failure is admitted. This failure arose from the negligent operation of the instrumentality defendant

relied upon to perform its contract. It is admitted that the instrumentality failed.

Counsel say (p. 44) that there is no causal connection between the seeped condition of the area and the ultimate failure of the canal. This argument, and the Court's finding based on this premise is contrary to the testimony of all the witnesses (Newell Tr. 487-88, App. Op. Br. 154-55 Tr. 507, App. Op. Br. 155) and Carter (Tr. 579-81, App. Op. Br. 156-157), and Mr. Newell gave the very pertinent testimony shown at Tr. 491, App. 154 when he testified that if the conditions existed he would have had it corrected.

“Q. And you would have done that because you would have thought it would be necessary to preserve the ditch?

A. That is correct.”

COUNSELS DISCUSSION OF THE BURDEN OF PROOF (Res. Br. 49)

Here counsel attempts to defend the court's error in refusing to consider the doctrine of *res ipsa loquitur*. We think the Court's error resulted from the fact that these cases rest primarily in a breach of contract, and he overlooked the fact that he was holding us to the burden of proving defendant's negligence in failure to perform. Counsel labors under the same error. They attempt to hold us to the contract theory in the application of the *res ipsa* rule and to the tort theory in the application of the negligence rule.

We know of no rule that prevents the application of the *res ipsa* rule when negligence is an element to be established.

The nature of the case is immaterial. The rule grows out of the necessity of proving facts patently in defendant's knowledge and not available to the plaintiff

and has particular application to cases where negligence is involved.

The rule was applied in Oregon in *Esberg Cigar Co. vs City of Portland*, 55 Pac. 961, where a city water main broke damaging the plaintiff's goods and in *Buf-fums vs City of Long Beach* (Calif) 295 Pac. 540, *Foltis vs City of New York* 38 N.E. (2) 455, 153 A.L.R. 1222, both involving broken water mains.

If the rule is applicable where the offending instrumentality is a cast iron pipe laid under ground surely it is applicable to an open unlined canal carrying 450 second feet of water over a porous hillside structure of such construction that water seeped through the sides and bottom sufficiently to disintegrate the bed and foundation.

COUNSELS TREATMENT OF FORM OF APPELLANTS CLAIM (Res. Br. 60)

Counsel contends our relief is limited to the provisions of the Tort Claim Act (28 U.S.C. 921 et seq) in which negligence must be established.

This question had attention in the pre-trial proceedings held on Dec. 2nd, 1947, as shown by the record of that proceeding held on Dec. 2nd, 1947, beginning at P. 68 and again at P. 126. The pre-trial order (Tr. 54) recites:

"The Court at the pre-trial conference allowed plaintiffs to amend their Complaint to plead in Contract under the provisions of the so-called Tucker Act (28 U.S.C., sec. 41, subsec. 20; 28 U.S.C., 250 et seq.) or under the Federal Tort Claims Act (28 U.S.C., 921 set seq.) or in the alternative. To the foregoing ruling by the Court the defendant objects."

Judge Fee carried the sense of this pre-trial order into his opinion (93 Fed. Sup. 779) where we read: (782)

“And, since this is all that the plaintiff asks of the Government, whether on the theory of contract, tort based on contract or as a result of the duty established by the laws of the state upon one assuming to act as a common carrier of water to lands to which the water right is appurtenant, the same basis for recovery is laid.”

In *Ettman vs Federal Life Ins. Co.* 137 Fed. (2) 121 we read: (127)

“The Federal Rules of Civil Procedure, 28 U.S. C.A. following section 723c, govern pleading, practice and procedure in the courts of the United States. These rules contemplate that every litigant shall have a trial of his case upon its merits and in accordance with the evidence and the applicable law. Whether the Company assumed in its pleadings and upon the trial that it must prove an intent on the part of the insured to deceive is of no consequence. The evidence received was within the issues made by the pleadings, and it was the duty of the trial court to apply the proper rules of law to the fact situation.”

Counsel argues that in some five of the claims there is a demand for more than \$10,000 each and therefor in excess of the court's jurisdiction if considered under the Tucker Act. The answer to this is that having asked for and been granted the right to recover under either act, there would be a waiver of any excess over the jurisdictional amount.

The court will permit such a waiver and retain jurisdiction under the Tucker Act. (*United States vs Johnson*, 153 Fed. (2) 846, *Oliver vs United States* 149 Fed. (2) 727; *Hill vs United States* 40 Fed. 441)

The cases being otherwise cognisable under the Tucker Act, the court can render judgment up to \$10,000 in each claim. The issues of damages having been retained for further hearing, a formal waiver of the excess claimed can be readily waived.

The matters discussed at Page 63 were decided against the United States and no appeal taken.

CONCLUSION

Having become, as Judge Fee determined (93 Fed. Sup), a common carrier of water, the liability of the defendant should be measured by the rule of liability in other common carrier cases, at least to the extent of showing that the loss for failure of performance was due to a cause beyond its control.

The court determined (93 Fed. Sup. 791) that:

“The defendant was handling a highly dangerous instrumentality” and recognized that “a high degree of danger calls for a very high degree of care. * * *”

This “very high degree of care” relates to keeping the water in the ditch or keeping the ditch in condition to retain the water.

The defendant employed this instrumentality in the performance of its obligation to the appellants. It is the nature of the instrumentality employed that measures the degree of care to be observed.

Having employed an instrumentality that called for a high degree of care, it was error to modify that requirement to one of “reasonable” care. (Finding No. 12-13 Tr. 95)

We urge that the record shows:

(1) That the great weight of the evidence is contrary to the Court’s finding, (2) That the present judgment results in a miscarriage of justice; and that the judgment of dismissal should be reversed.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M.
WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS PETITION FOR REHEARING

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FILED

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PAUL P. O'BRIEN
CLERK

*Appeals from the United States District Court,
for the District of Oregon.*

No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M.
WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Apellee.

APPELLANTS PETITION FOR REHEARING

*Appeals from the United States District Court,
for the District of Oregon.*

Claimants and appellants on the grounds following, petition for a rehearing of so much of the Court's opinion and judgment as holds: (1) that the contract between the defendant and the Irrigation District was not made for the benefit of appellants and (2) that the defendant was not liable because of the terms of the contract.

Discussing these points in the above order, we most respectfully urge that the contract between the defendant and the Irrigation District was made for the sole and exclusive benefit of the appellant landowners and that they are the real parties in interest, and the only parties who have a cause of action for a breach of the contract.

The contract involved is an agreement by defendant to store and deliver to plaintiffs (and other similar

water users) for one purpose only, to-wit: the irrigation of plaintiffs lands to which lands the water had become an appurtenance. The right to the use of the water belonged to the plaintiff and the defendant was merely a carrier for hire. (*Ickes vs. Fox* 200, U.S. 82, 57 S. Ct. 412) The Irrigation District named in the contract had no beneficial interest in the contract. It had no lands to irrigate and was limited by the law creating it to the purpose of acting as a vehicle, or agency, for the collection from the landowners of construction and operating charges, and transmitting the proceeds to the defendant in compensation for the services performed by the defendant.

The laws of the State of Oregon require, as a premise to a valid appropriation, that the water be seasonably put to a beneficial use. (In this case irrigation.)

Without the activity of the plaintiff in applying the water to a beneficial use, and thus effecting an appropriation, the defendant could not be allowed to store, divert or otherwise control the water.

It is quite apparent that the Irrigation District would have no cause of action for a shortage of water, because it was not a water user and could not be damaged.

In this respect, this case differs from *H. R. Mack Co. vs. Rensselaer Water Co.* 247 N.Y. 159, N.E. 896, cited by the Court. There it was suggested (P. 897 N.E. Cit) that the City had the primary interest:

“for the benefit of the City in its corporate capacity, in which branch is included the service of the hydrants. * * The benefit, as it is sometimes said, must be one that is not merely incidental and secondary. * * It must be primary and immediate in such a cause and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.”

The distinction appears more clearly in the case of *German Alliance Ins. Co. vs. Home Water Supply Co.* 226 U.S. 220, 33 S. Ct. 32, where Justice Lamar pointed out the basis of liability of a water company which contracts to deliver water. We quote:

“The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities; though, with the introduction of reservoirs, standpipes, pumping stations, and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.”

There is another marked distinction between the class of contracts referred to in the Rensselaer case and the present contract, in that in the former the consideration comes from the general taxpayers of the municipality regardless of their benefit from the contract while here the only consideration comes directly from the land owners, who are the sole beneficiaries of the contract.

This distinction brings this case within the reasoning of a long line of Oregon cases on this point. *Section 1-301 O.C.L.A., Oregon Construction Co. vs. Allen Ditch Co.* 41 Or. 209, 59 Pac. 455; *Little Walla Walla Irr. Dist. vs. Preston*, 46 Oregon 5, 78 Pac. 982; *Nevada Ditch Co. vs. Pacific Livestock Co.* 63 Or. 363, 127 Pac. 984; *Caviness vs. La Grande Irr. Co.* 60 Or.

410, 119 Pac. 731; *Phez vs. Salem Fruit Union* 103 Or. 514, 20 Pac. 222 and especially within the doctrine of *Weinhard vs. R. R. Thompson Estate Co.* 242 Fed. 315, where Judge Wolverton refers to supporting Oregon decisions.

The Rensselaer case is further distinguished because of the rule found in the Restatement.

In *Restatement of the Law of Contracts*, Vol. 1, Sec. 145, we read:

"BENEFICIARIES UNDER PROMISES TO THE UNITED STATES, A STATE, OR A MUNICIPALITY.

A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, *unless*,

(a) An intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or

(b) *The promisor's contract is with a municipality to render services the non-performance of which would subject the municipality to a duty to pay damages to those injured thereby."*

The Rensselaer case is contrary to the American Majority Rule found in *12 Am. Jur.* 825, Sec. 274, and the rule as stated in *17 Am. Jur.* 839, Sec. 286.

This unbroken line of authority points to the error in the court's holding that plaintiffs have no capacity to maintain this action.

We pass to the further holding of the Court that the defendant is protected by Section 44 of the Contract which protects the defendant from liability on account of drought, inaccuracy of distribution, or other causes, there may in time occur a shortage in the water supply for the lands of the District.

It is plaintiffs contention that this language does not apply to a failure to supply water because of a canal break. The rule of *Ejusdem Generis* would compel the "other causes" to fall within the class particularly enumerated that is, drought, or inaccuracies in distribution.

The words "other causes" being general terms, and following the specific words of "drought" and "inaccuracy of distribution" are to be construed as limited to causes of the same kind as are described by the special words. (*Hills vs. Joseph* 229 Fed. 865 (9th C.C.A.) *Koth vs. United States* 16 Fed. (2) 62 (9th C.C.A.))

While it is perfectly reasonable to assume that the contracting parties would agree that the defendant would not be liable for water shortage in case of a drought or the minor damage that would result from inaccuracies of distribution or other similar causes, it is not reasonable to assume that they are intended to release the defendant from *all other* causes of damages even to the extent of established negligence of the defendant.

The trial court's finding (Tr. 95) on the present record that defendant owed a duty to exercise reasonable care to deliver water seems to us as the proper interpretation of this particular provisions of the contract.

We respectfully contend that the foregoing authori-

ties justify a reconsideration of the court's opinion in construing the contractual relation between the parties, and the liability of the defendant in connection therewith.

Respectfully submitted,

P. J. GALLAGHER

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CERTIFICATE

The foregoing Petition for rehearing is believed to be meritorious and is presented in good faith and not for the purpose of delay.

P. J. GALLAGHER

MARTIN P. GALLAGHER

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